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CURRENT EVENTS.

THE LESSON OF THE ANARCHIST CASE.—We have heretofore said very little about this case because we thought that comment would be premature and futile. Since, however, Governor Oglesby has, with the best intentions, no doubt, discharged *two-thirds* of his duty, and the curtain has fallen upon the great Chicago tragedy, we will express our opinion on the subject and of the lessons which it teaches.

We do not propose to go behind the record, to usurp the province of either court or jury; when the highest autnority known to any civilized community, a court of the last resort has decided upon a full record, that a trial was fair and a verdict just, the presumption is almost, if not quite conclusive, that they were fair and just, and should not be questioned except upon grounds much stronger than any we have seen adduced. These defendants had the full benefit of every safeguard of life and liberty enjoyed by the people among whom they had elected to dwell, and as those safeguards failed to protect them, we must needs conclude that they did not deserve protection.

A great deal has been written of late about "trial by newspaper," and it has been seriously urged that the conviction of these defendants was, in a great measure, attributable to the denunciations of the newspaper press. The fact is, that trial by newspaper is one of tests to which every public man must submit. Every man who emerges from the dead level of private life, either as a statesman or a criminal, must undergo this ordeal. It is of the very essence of the liberty of the press, that the newspapers shall have "a charter as wide as the winds" to say whatsoever they may think proper about all public men, and all public events, subject only to the law of libel and the higher law of common decency.

In reviewing the facts of this case we are deeply impressed by the danger to public order and social security which has been averted by Governor Oglesby's decision. If he had commuted the punishment of all these men, we think two consequences would have followed; that, wheresoever in the United States a crime of unusual atrocity should hereafter arouse the indignation of the people, lynch law would at once become rampant, and the offender, or *supposed* offender, be put to death in utter contempt of the laws of the land; and the second consequence of such a weakness would have been that it would have practically abolished the death penalty. Men would ask, and we think nearly all men would ask: "With what sort of decency can you execute a common murderer after the Chicago assassins have escaped the gallows?" We think the effect of this execution is thus far salutary, and has averted a serious danger to law and order.

"The law's delay" is, of course, always a standing grievance, but in this case it has operated both ways. Eighteen months elapsed between the Haymarket massacre and the execution of four of the criminals who perpetrated it, and within that time many people of weak minds and short memories have forgotten the horror and detestation with which they regarded the crime when it was committed, and sympathized with the sufferings of the convicts and signed petitions for clemency. To this extent the delay seemed to have operated against the course of justice. On the other hand, the consummation of the sentence after so many months will go far to satisfy many that justice, though slow, is sure. For all that, however, the administration of criminal law is too slow. In England, for a crime of like atrocity, they would in four months, have hanged an Englishman and a *fortiori* an Irishman, and in France, under the same circumstances, the guillotine would have been put into operation with even less delay.

This case ought to direct the minds of legislators and leaders of public opinion to the serious consideration of the question, whether it is possible to frame laws which will suppress or circumscribe the pestilent agitation of which these men were the exponents without endangering the invaluable rights of free speech and a free press.

It would appear at first sight that this could be done, but we are inclined to the opinion that it cannot, and yet it is passing

strange that it cannnot. We can easily distinguish between a stalk of corn and a noxious weed, between an obscene publication and a religious tract; if we enter a public hall we can tell within a few seconds whether the speaker is advocating democratic or republican doctrines, and yet a man may be permitted to preach for hours hostility to all human governments, to all law, to all social institutions, because the law cannot make a distinction between his political doctrines and those of the respectable parties we have named.

It is as well perhaps that it is so, let the law confine itself to overt acts, and let the expression of opinion, oral or printed, continue free.

However, the criminal laws of all the States might well be strengthened with reference to this particular class of offenders. The manufacture or possession of dynamite bombs, or other like deadly explosives, intended or adapted to the destruction of human life should be made a felony of high grade, and the offense of causing death by their explosion should be held, without more or further evidence, to be murder in the first degree.

MODESTY.—"Modesty is a quality which highly adorns a woman." We learned this in our copy-book days, but we never knew how gracefully it bedecked an editor until we read the subjoined paragraph from the *Albany Law Journal*, of the 5th inst.:

"Mr. Charles C. Soule, the well known law-book seller of Boston, whose shop has the odor of sanctity belonging to the late Freeman street chapel, has issued a catalogue of his publications, with portraits of the authors, including Messrs. Wood, Schouler, Stimson, Chamberlayne, B. V. Abbott, Ewell, Jones, Sheldon, Indermaur, Cohen, Henry Austin, and another—a fine aray of intellectual beauty, excepting that other."

We only know "that other" in the spirit, but from that knowledge have no doubt, that those who know him in the flesh, will assign to him as his proper place in Mr. Soule's galaxy of worthies, the position *facile princeps*, or at the very least, of *primus inter pares*.

NOTES OF RECENT DECISIONS.

INSURANCE—"WHOM IT MAY CONCERN."—The Supreme Court of Pennsylvania, recently rendered a decision,[1] which it shows, among other things, that the well known phrase "whom it may concern" does not always mean exactly what it says.

The facts were, that Donaldson made a contract with Null to build a house for him (Donaldson) and there was a stipulation in it that Null should, while the building was in progress, keep the property insured "for whom it may concern," but to this clause was added a stipulation, that in case of loss by fire the insurance money should be divided between the parties to the contract, according to their respective interests. The house was burned, the insurance money was paid and divided between Null and Donaldson, and plaintiff, a material man who lost some of his property by the fire, claimed the benefit of the clause "to whom it may concern," under which, as he alleged, he was entitled to part of the insurance money.

The court held that the clause in question was in effect nullified by the subsequent clause, and that "whom it may concern" meant simply Donaldson and Null. It says:

"The controlling question is this: Was the clause quoted above made for the plaintiff's benefit? If it was, they may sue upon it, although they are not parties to the instrument.[2] We thought upon the trial, however, and still think, that the phrase in dispute refers to Null and Donaldson alone. Their respective interests in the building would vary from time to time, Null's being at first exclusive, and Donaldson's increasing gradually as the building grew, and he made the payments agreed upon. In our opinion these were the only interests the parties had in view, for they immediately go on to provide that, in case of loss, the indemnity shall be 'divided between the parties hereto.' This is a plain declaration that the persons 'whom it may concern' are 'the parties hereto,' and since no provision follows that, after division, the proceeds are to be held by either, for the benefit of any other

[1] Mosser v. Donaldson, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 766.

[2] Wynn v. Wood, 97 Pa. St. 216; Dreer v. Pennsylvania Co., 108 Pa. St. 226; Zell's Appeal, 111 Pa. St 532; 6 Atl. Rep. 107.

person, we see nothing in the agreement on which to base the plaintiff's claim. There is certainly no express contract to hold the proceeds in trust for the plaintiffs, and the reason for implying a contract to that effect is considerably weakened by the consideration that they could themselves have insured their interest in the building. [3] They had a direct pecuniary interest which would be damaged by its destruction. [4] But aside from this the defendant was under no duty to protect them from loss, and, not having agreed to do so in fact, we think this suit cannot be maintained."

We are not fully satisfied as to the accuracy of this ruling. The phrase "whom it may concern" has a distinct, well settled technical meaning, and people who use phrases of that description should be held to have used them in their technical sense; the phrase signifies indefinite persons who at the proper time may have an interest in the subject matter. The phrase was either the controlling clause or it was surplusage. The rule is, that in the construction of any instrument, effect shall be given, if possible, to every portion of it, and in this case we think the fair meaning of the two clauses taken together is that the insurance was for the benefit of "whom it might concern," but that as between Donaldson and Null, their share should be divided between them according to the amount of their respective interests at the time the loss might occur. As the court remarks, their interests were shifting and indefinite, as to their respective amounts during the progress of the building operations, that of Null diminishing, and that of Donaldson increasing, and the parties might well have added, out of abundant caution, a clause settling the principle upon which the division should have been made.

The court founds its decision upon the fact that the plaintiff might have insured his interest separately. That is very true, but the fact that he did not so insure his interest tends to show that he relied upon the insurance effected by Null which he had a right to do, as the terms used in the policy have a distinct technical meaning which clearly included his interest.

[3] May on Insurance, 99, § 87; note to Strong v. Insurance Co., 20 Am. Dec. 512; Stout v. Insurance Co., 12 Iowa, 371; 79 Am. Dec. 539.

Insurance Co. v. Wagner (Pa.), 7 Atl. Rep. 103.

THE RIGHT TO BEGIN AND REPLY IN SPECIAL PROCEEDINGS.

I.

SECTION.

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§ 1. *Purpose of this Article.*—From a former article on this subject,[1] it would appear that there is no difficulty in determining, on principle and authority, with which party the right to open and close the argument rests, in ordinary actions between plaintiff and defendant. But, as was there suggested, in many special proceedings the situation of the parties is such that it is difficult to determine which is to be deemed to stand in the position of plaintiff and which in that of defendant. In these cases the courts have not been able to lay hold of and adhere to any governing principle, and the result is a great confusion and contrariety of holding; so that on perhaps no point can a uniform rule of procedure, applicable in all American jurisdictions, be said to exist.

§ 2. *The Governing Principle Stated.*—Recollecting the general principle, developed in the former article, that the right to open and close is generally coincident with the initiatory burden of proof, that is, that it belongs to the one who, in order to succeed in his action or defense, must go forward and prove *something* in the event of no proof being offered by the opposing party—we arrive at a governing principle, which should furnish an adequate rule in every special proceeding, namely, that the right to open and close *belongs to the party who seeks to alter the existing state of things.*

§ 3. *On an Issue of Sanity.* — A simple illustration of the application of this principle is found in cases where the issue is whether a certain person is, or was at a certain time, sane or insane. The general pre-

[1] *Ante*, 171.

sumption is in favor of sanity, because, according to human experience, men and women are commonly sane. The party asserting the sanity of the person whose sanity is in question, has therefore, at the outset, nothing to prove; but the burden, and with it the right to open and close the contest, rests upon the person asserting the contrary. He is the one who seeks to overthrow the general presumption, or to alter the commonly existing state of things. Thus, on the hearing of a commission of lunacy in Pennsylvania, the burden of proof, and with it the right to open and close the argument, is with the commonwealth.[2] So, on an issue from an orphan's court, or court of probate, to ascertain the sanity of a testator, the party objecting to the probate of the will on the ground of the testator's insanity is the moving party, and the right is with him.[3]

§ 4. *On an Issue of Devisavit Vel Non.*—(1) *What Rule upon Principle.*—The principle already suggested,[4] would, if kept in view, furnish a uniform rule for determining with which party the right lies, in cases of contested wills. That rule would be that, when a will is first brought into court and exhibited for probate, the right is with the proponent or party affirming the will; and that, after the will has been admitted to probate in common form, in any future proceeding to contest its validity, whether in the same or in another tribunal, the right is with the contestant, called variously the plaintiff, the petitioner, the *caveator*, or the objector. The reason is that the executor, or other party who first presents the will in the probate court and seeks to prove it and have it admitted to record, is the acting party; he seeks to move the court; he must bring forward some evidence or the court will not grant his motion. He must at least produce a paper, testamentary in its character, and prove in a formal way that it was executed by the person whose last will and testament it purports to be. If, at this stage of the proceeding, he meets in court an objecting party, as he must produce *some evidence* in order to get what he seeks, he comes within the rule above stated and more fully developed in the former article, which gives the right to open and close to him.[5] On the other hand, if the will is admitted to probate on his motion, and the objecting party persists in his contest, either by an appeal to a higher tribunal,[6] by an issue of *devisavit vel non* triable by a jury in a court of law, by a bill in chancery,[7] or by some other mode of procedure, generally prescribed by statute, he will become the moving party, the party who seeks to alter the existing state of things. A presumption obtains that the decision of the court of probate was right; he must overthrow that presumption by evidence; and consequently the office of taking the initiative in the production of evidence, and with it the right to open and close the argument, rests with him. But, in the various conclusions at which the courts have arrived, neither the principle of this text, nor any other uniform principle, has been adhered to.

(2.) *Cases Which Concede the Right to the Proponents.*—We gather from different jurisdictions a group of cases which, without reference to the stage or form of the proceeding, concede the right to the caveators, objectors or assailants of the will, sometimes called petitioners, and even plaintiffs. Thus, it is held in several of the New England States that, on an appeal from a decree of the probate court establishing a will, (the ground of the contest in most cases relating to the sanity of the testator), the burden of proof, and with it the right to open and close belongs to the executor, or to the party affirming the will.[8] These courts apply this rule

[2] Com. v. Haskell, 2 Brewst. (Pa.) 491.
[3] Dunlop v. Peter, 1 Cranch C. C. 403.
[4] *Ante*, § 2.

[5] McClintock v. Curd, 31 Mo. 411.
[6] Rogers v. Diamond, 13 Ark. 475, 480; McDaniel v. Crosby, 19 Ark. 543; Tobin v. Jenkins, 29 Ark. 151, 153; Edelen v. Edelen, 6 Md. 288, following Brooker v. Townshend, 7 Gill (Md.), 10, distinguishing Stockton v. Frey, 4 Gill (Md.), 407; Comp. Kearney v. Gough, 5 Gill & J. (Md.) 457.
[7] Contrary to the doctrine of the text, it was early held in Kentucky that, in a statutory proceeding by a bill to contest a will which has been admitted to probate in the county court, the burden of proof, and with it the right to open and close, belongs to the proponents of the will, defendants in the proceeding. Van Cleave v. Bean, 2 Dana (Ky.), 155; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48. The New England cases cited further on are also opposed to the conclusion of the text.
[8] Comstock v. Hadlyne Ecc. Soc., 8 Conn. 254; Buckminster v. Perry, 4 Mass. 593; Phelps v. Hartwell, 1 Mass. 71; Brooks v. Barrett, 7 Pick. 94; Ware v. Ware, 8 Me. 42, 53; Perkins v. Perkins, 39 N. H. 163, 167; Boardman v. Woodman, 47 N. H. 120, 132; Gass v. Turner, 21 Vt. 440.

without reference to the question which party is the appellant, and without regard to the *form* of the issues as made up; reasoning that, according to the *substance* of the issues, the party assailing the will takes the affirmative of the issue. Whether this is true, where the sole ground of the contest is the alleged insanity of the testator, would seem to depend upon the view which is taken of the nature of the proceeding. If it is viewed as an original proceeding instituted to set aside the judgment of another tribunal, then the rule is contrary to principle, for presumptively the judgment of the probate court is right. But if it is viewed as a new trial in the same proceeding, then the conclusion would be different.

An appeal in cases of this kind is not in the nature of a writ of error; its purpose is not to correct errors of law committed by the original court of probate; but it merely secures to the appellant a new trial of the same controversy in a higher tribunal, upon the same or such other evidence as the parties may be able to produce. This being the nature of the case, the proceedings, in the original court of probate may be disregarded; they may be treated as having been entirely vacated by the appeal; they may stand as though they had never taken place, just as in the case of appeals from justices of the peace to courts of record, in most American jurisdictions, in which cases the issues stand for trial exactly as they stood in the court below; the party having the burden of proof, and with it the right to open and close in that court, has it in the appellate court. On this principle the New England rule may be vindicated; for, as already pointed out, in every case where a will is offered for probate in the first instance, the proponent assumes the initiatory burden of proof. Viewing the trial of such a contest, when appealed from the probate court, as merely a new trial of the same case before a different tribunal, the New England rule also conforms to another principle pointed out in the preceding article, namely, that the right to open and close the argument does not shift with the shifting of the burden of proof. So that, although in the appellate court the objectors may be required to go forward with the production of evidence, the right to open and close the argument will remain with the proponents.[9] In Ohio, the contestants are at liberty to proceed, either according to the forms of a suit in chancery, or by petition under the code of civil procedure; but in either case it is laid down that an issue must in some form be made up, "whether the writing produced be the last will of the alleged testator or not;" and in either case, on the trial of such issue, the party or parties setting up the will hold the affirmative, and are entitled to open and close the case;[10] and this although the will, admitted to probate and recorded, is *prima facie* evidence of its validity, due execution and contents, so as to cast the burden of proof upon the contestant.[11] The rule is the same in Kentucky, where the proceeding is by a bill in chancery, to set aside a will on the ground of the insanity of the testator, after it has been admitted to probate in the county court.[12]

§ 5. *In Actions of Replevin.*—Lord Tenterden said that, in respect of this question, he could make no distinction between replevin and other forms of action; the principles applicable to all were the same. The consequence was that the plaintiff was entitled to begin, as there was an affirmative issue upon him.[13] The Supreme Court of New Hampshire, following this principle, held that, in replevin, where the plaintiffs alleged that the articles replevied were their property, upon which issue was joined, and also that the articles were mortgaged to them, which allegation was denied by the defendants, upon which denial issue was joined, —the affirmative of both issues was with the plaintiffs, and that they had the right to open and close.[14]

But the Supreme Court of Indiana has held that, where the answer sets up, in avoidance, that the defendant is entitled to a lien upon the goods for freight, wherefore the plaintiffs are not entitled to the possession of them, and the reply is a denial of such new matter—the burden of the issue is upon the defendant, and he is entitled to

[9] Brooks v. Barrett, 7 Pick. 94.
[10] Brown v. Griffiths, 10 Ohio st. 389.
[11] Banning v. Banning, 12 Ohio St. 437. See also Randebaugh v. Shelley, 6 Ohio St. 307.
[12] Vancleave v. Bean, 2 Dana (Ky.), 155; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48.
[13] Curtis v. Wheeler, 1 Mood. & M. 493.
[14] Belknap v. Wendell, 21 N. H. 175, 182.

open and close.[15] The court, in so holding, recognize as correct doctrine the *dictum* of Professor Greenleaf, that, whenever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case and is entitled to reply.[16] In Kentucky, where the answer admits that the possession of the chattel was in plaintiff, but denies that the chattel was taken from plaintiff's possession as alleged in the petition, and then sets up that the defendant was the owner of the chattel, it has been held that the right to open and close the argument to the jury is with the defendant. The ruling is based upon the provision of the Kentucky Code of Practice, § 347, that the party having the burden of proof has the right to conclude the argument. "It is evident," said Simpson, C. J., "that, on this state of pleading, if no evidence had been adduced by either party, the plaintiffs would have been entitled to a judgment for the slave. Their possession was *prima facie* evidence of title; and that being admitted by the defendant, it then devolved upon him to introduce evidence to repel that presumption, and if he failed to do it, a judgment should have been rendered against him. Consequently, the burden of proof was upon him, and he had a right to the conclusion of the argument with the jury." [17]

In Illinois, it has been ruled that, in replevin for goods levied upon by an officer, under an execution, as belonging to the defendant in the execution, where the defendant pleads facts to estop the plaintiff in replevin from claiming the property or denying that it belonged to the defendant in execution, which facts are denied by the plaintiff, the defendant has the right to open and close.[18]

These last decisions overlook the fact that the object of the statutory action of replevin is not merely the recovery of the possession of the chattel. The plaintiff seeks, in the event the chattel is not restored to him prior to the trial under his delivery order, or subsequently under execution issuing to enforce his judgment, an alternative judgment for its value; and in either event he also seeks a judgment for the damages which he has sustained in consequence of its detention by the defendant. Unless, therefore, the chattel has been restored to him prior to the trial, and unless he also waives his right to a recovery of damages for its detention, he must, if his action is brought in the usual form, *prove something* in order to the full relief which he seeks, notwithstanding the defendant may in his answer have made the admissions above stated. In conformity with Lord Tenterden's view, and with the settled rule as shown in the preceding article, the right to open and close would rest with him, and not with the defendant.

§ 6. *In Cases of Replevin of Cattle Distrained for Rent with Avowry of Rent in Arrear.*—Unless repealed by recent statutory enactments, an unjust rule of the common law still disgraces the jurisprudence of two or three of the older American States, by which a landlord, whose tenant is in arrears for rent, may go upon the land occupied by the tenant and drive away and impound any cattle which he may find there, whether belonging to the tenant or to any innocent third person, and hold them until the rent is paid, —thus making himself not only a judge in his own cause, but, in a controversy between himself and his tenant, rendering judgment in his own favor without notice to the tenant, without the formality of a trial, and executing his judgment at the same instant, and equally without notice.[18a] The remedy of the tenant, if the cattle were his, and if no rent were in arrear, or if the cattle were not on the freehold of the landlord at the time of the distress, was an action of replevin. In this action the landlord filed a plea called an *avowry*, in which he admitted the possession of the plaintiff, but set up that the cattle were distrained when upon his (the defendant's) freehold, whereof the plaintiff was tenant, and that the plaintiff was in arrear for the rent. To this the plaintiff would ordinarily reply, either denying that he was in arrear for the rent, or alleging that the cattle when distrained were not upon the freehold of the defendant, but on the freehold of some other person, naming him.[19]

[15] McLees v. Felt, 11 Ind. 218.
[16] 1 Greenl. Ev. § 74.
[17] Vance v. Vance, 2 Metc. (Ky.) 581.
[18] Colwell v. Brower, 75 Ill. 517.

[18a] 3 Bla. Com. 8.
[19] See the nature of the action and the form of the plea as stated in 1 Chitty Pl. 533.

There seems to be nothing to distinguish such a case from any other action of replevin, in respect of the right to begin and reply; the plaintiff would have something to prove, in order to establish the value of the chattels, or the amount of damage sustained by reason of their caption and detention, unless these allegations of his declaration, as well as that asserting his original right of possession, were admitted by the defendant's plea,—which would vest the right to begin and reply in him, and it has been so held.[20] Thus, in replevin for cattle alleged to have been illegally taken and impounded by the defendant, the defendant avowed the taking of the cattle upon a certain lot of ground, alleging that the same was his soil and freehold. The plaintiff replied that the soil and freehold were in one T., and tendered an issue thereon, in which the defendant joined. It was held that the plaintiff had the right to open and close.[21]

§ 7. *In Cases of Interpleader.*—In the case of a bill of interpleader in equity, or of the corresponding proceeding under codes of procedure, where a party has possession of a fund belonging to one or more of several parties who contend against each other for the possession of it, and, to exonerate himself, presents a bill or petition in court, praying that these rival claimants may be required to interplead for the fund and that he may pay it into court and be exonerated,—it is difficult to say with which one of the rival claimants the right to begin and reply rests, since all are equally plaintiffs and defendants; each is an actor, and each defends against the contention of the others. It is supposed that such a case must yield to the sound discretion of the court, and that this discretion would be best exercised by giving each claimant a stated period in which to argue in support of his own claim and against the evidence adduced in support of the claim of his opponents. As all would be equally entitled to a reply and as all could not have a reply without giving the last word to some one of them, it would seem that none should be allowed to make a second argument. A case which presented less difficulty was a proceeding by garnishment, in which, under the issue as made up, it was held that the interpleading claimants had the affirmative and consequently the right to begin and close.[22]

§ 8. *In Criminal Cases.*—In criminal cases the defendant is presumed to be innocent until he is proved to be guilty. The burden rests upon the State to prove, beyond a reasonable doubt, every fact essential to a conviction. From this it necessarily follows that, in all cases, the right to open and close is with the prosecution, unless a different rule is declared by statute. This is so, although the accused offers no evidence;[23] nor does the fact that the accused sets up the defense of insanity shift the right to him. Where counsel are employed by private parties to assist the prosecuting officer of the State in a criminal trial, it is within the discretion of the court to allow such counsel to make the concluding argument to the jury in the place of the prosecuting attorney, although the prosecution is for a felony[24] which is capital.[25] But a statute which changes this rule and gives the right of concluding the argument in a particular event to the defendant is not directory, but mandatory; it clothes him with a substantial right, which the court is not at liberty to disregard or abridge, the denial of which will work a reversal of a conviction. It has been so held in respect of a statute giving the defendant this right in cases wherein he introduces no testimony.[26]

§ 9. *In Cases of Fraud.*—A general presumption of right-acting attends human conduct; and therefore fraud is never presumed but must be affirmatively proved as a fact, and of course the burden of proving it lies upon the party alleging it. But it does not follow from this that where fraud is set up as a defense to an action on a contract, this necessarily shifts the burden of proof, and with it the right to open and close, to the defendant. If the fraud which is thus pleaded is what the civilians call *dolus dans locum contractui*, that is a fraud giving occasion to the contract itself, the pleading of it may be

[20] Kearney v. Gough, 5 Gill & J. (Md.) 457; Hungerford v. Burr, 4 Cranch C. C. 449. See also Greer v. Nourse, 4 Cranch C. C. 527.

[21] Thurston v. Kennett, 22 N. H. 151, 158, following Belknap v. Wendell, 21 N. H. 175.

[22] Randolph Bank v. Armstrong, 11 Iowa, 525.

[23] Doss v. Com., 1 Gratt. (Va.) 557; State v. Millican, 15 La. Ann. 557.

[24] State v. Waltham, 48 Mo. 55.

[25] State v. Hamilton, 55 Mo. 520; Jarnagin v. State, 10 Yerg. (Tenn.) 529.

[26] Heffron v. State, 8 Fla. 73.

regarded as no more than a *special denial* of the facts on which the plaintiff predicates his right of action; since it is not very material in principle whether the defendant merely denies the existence of the contract, or affirmatively states certain specific facts which, if true, show that the contract, though formally made, was void. There is room, however, for the view that an answer setting up such a defense should be regarded as setting up an extrinsic defense; since fraudulent representations or concealments, whereby a party has been induced to enter into a contract, do not make the contract void *ab initio*, that is to say, non-existent from its inception, but merely give to the party thus induced to enter into it the right to disaffirm it within a reasonable time after discovering the fraud. He may affirm or disaffirm, but he cannot do both; he cannot keep the benefits which he may have received under the contract from the other contracting party, and at the same disaffirm it so far as it imposes duties or obligations upon him. His right, therefore, when sued upon the contract, is at most a right of rescission, that is, either a right to have it then rescinded for the fraud, or a right to plead and prove that, because of the fraud he had, within a reasonable time after discovering the fraud, elected to rescind it. In this view the defense of fraud, set up in an action on a contract may well be regarded as an extrinsic defense, since it amounts to something more than a mere denial or traverse of the allegation of the existence of the contract. We find that courts have taken both views of this question—some treating such an answer as a special denial, and others treating it as the pleading of an affirmative defense. Whichever view is taken, the opening and closing is, on principle and authority,[27] to be given to the plaintiff in every case where the contract liquidates the damages. In other cases, if the allegation of fraud is to be regarded as a special denial, the right equally remains with the plaintiff; but if it is to be regarded as the pleading of an extrinsic defense, the right plainly rests with the defendant. When, therefore, the plaintiff sues to recover specific chattels, and his right to recover is predicated on his establishing a *bona fide* ownership of the property, he cannot, it has been held, be deprived of his right to open and close, by reason of the fact that the defendant alleges that his title is fraudulent and void,—the courtr egarding this as in nature of a special denial.[28] In like manner, it has been held that, in an action for the recovery of damages for the wrongful seizure and conversion of goods, to which the plaintiff claims title, if the defendant answers, simply alleging fraud in the assignment under which the plaintiff claims, the plaintiff, on the trial, is entitled to open and close; because the effect of the answer is not to admit that the plaintiff ever had title to the goods, but it is in effect only a special denial of the title alleged in the petition. The court say: "Before the plaintiff would be entitled to recover at all, he would have to show a title in himself; but the answer admits nothing but a fraudulent assignment, which is not an admission of any title. This state of the pleadings, under the third clause of § 266 of the [Ohio] code, gave the affirmative of the issue to the plaintiff."[29] On the contrary, and apparently, on the view that the defense of fraud is an affirmative defense, it has been held, in an action to recover the value of goods attached by a sheriff, where the defendant, before the trial, filed a pleading in which he admitted the plaintiff's possession and that he had the right of possession at the time of the seizure, but alleged that his title was obtained by a transfer from the attachment debtor in fraud of his creditors,—that the burden, and with it the right to open and close, is with the defendant.[30] So, in Georgia, it has been held that, where an insolvent debtor, arrested and held in execution under a *ca. sa.*, institutes a proceeding in the inferior court to obtain the benefit of the statute for the relief of insolvent debtors, and creditors appear and object on the ground of fraud, the burden of the issue which is made up is on the objecting creditors, and the corresponding right to open and close rests with them. The reason for this holding is that the debtor has no proof to make—nothing to do but to take the oath and be discharged, for which reason the

[27] Patton v. Hamilton, 12 Ind. 256; Elwell v. Chamberlin, 31 N. Y. 611; Brennan v. Security Life Ins. Co., 4 Daly (N. Y.), 296.

[28] Churchill v. Lee, 77 N. C. 341. See also McRae v. Lawrence, 75 N. C. 289; 1 Greenl. Ev. § 74.

[29] Beatty v. Hatcher, 13 Ohio St. 115, 119.

[30] Bixby v. Carskaddon (Iowa), 29 N. W. Rep. 626.

creditor alleging the fraud assumes the substantial burden of proof, and is the movant within the meaning of the rule of court which governs the question.[31]

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[31] Johnson v. Martin, 25 Ga. 269, 271.

NEGOTIABLE INSTRUMENT — TRANSFER AFTER MATURITY — PRESENTMENT—REASONABLE TIME—INSOLVENCY OF MAKER.

BASSENHORST V. WILBY.

Supreme Court of Ohio, October 4, 1887.

1. *Negotiable Instrument — Transfer After Maturity.*—A negotiable promissory note may be transferred by indorsement after maturity, so as to bind the indorser, if, within a reasonable time thereafter, it is presented for payment, and due notice is given in event of default.

2. *Same —Presentment—Reasonable Time.*—A reasonable time for its presentment is the lapse of such a period after the indorsement as, under all the circumstances, will enable the holder, in the exercise of legal diligence, to present it; and this being a mixed question of law and fact, where the facts are in dispute, it should be submitted to the jury; but where the material facts are admitted, it is a question of law for the court.

3. *Same—Insolvency of Maker.*—The known insolvency of the maker does not dispense with the necessity of presentment, in order to hold the indorser.

MINSHALL, J., delivered the opinion of the court:

The suit below was upon an indorsement of a certain promissory note. The note had been made by Hyman and Armstong for the sum of $255.25, payable to W. C. Bassenhorst, or order, one day after date. It was dated January 2, 1883, and was indorsed to the plaintiff, July 30th, by the following indorsement: "Pay to the order of Charles B. Wilby. W. C. Bassenhort." The plaintiff in his petition simply alleged that the defendant was indebted to him upon this indorsement in the amount of the note and interest, and "that due demand for payment * * * had been made, and that the defendant has received due notice of said demand and non-payment of said note." The answer was a general denial. From a bill of exceptions taken on the trial, it appears that at the close of the plaintiff's evidence the defendant moved for judgment on the ground that payment of the note had not been demanded of the makers, and notice of non-payment given the defendant, in a reasonable time. A similar motion was made at the close of the case. Both motions were overruled, and the jury, by direction of the court, rendered a verdict in favor of the plaintiff. To all which exceptions were duly reserved. It also appears that the defendant offered to show his own understanding as to the purpose of the indorsement at the time he indorsed the note. This was refused and exception taken. These rulings of the court are assigned for error.

The court, as we think, was right in assuming the duty of directing what the verdict should be; as, upon the evidence, there was no ground for controversy as to any of the material facts of the case; but it erred, as we think, in directing that it should be for the plaintiff instead of the defendant.

All the parties resided in the same place, the city of Cincinnati. The makers of the note were insolvent at the time of the indorsement, and had made an assignment for the benefit of their creditors a few days after the making of the note. It was made on the second of January, 1883, and was indorsed on the thirtieth of July following, so that it was some six months overdue at the time of the indorsement. The settlement of the assignment was delayed by litigation between the general and certain secured creditors, particularly with James M. Armstrong, the father of one of the assignors, to whom a mortgage to secure some $8,000 had been given a short while before the assignment. On the day the note was transferred and indorsed, Bassenhorst, the payee, called at the office of the assignee, Mr. Wald. He and the plaintiff, Wilby, were partners in the practice of the law, and so occupied the same office. On being informed that by reason of the pending litigation the note could not be paid, and the assignee having refused, for obvious reasons, to discount it, Bassenhorst turned to Wilby, who was present in the office, and requested him to discount it. Wald examined his books, and informed Wilby that it would be a safe investment, and Wilby then offered Bassenhorst the face of it. This was refused at the time, but during the day a boy returned to the office with the note indorsed, and a message from Bassenhorst that he accepted the offer. Thereupon Wilby drew his check for the amount, and received the note. This is all that transpired between the parties during the transaction, and up to the twenty-first of November, when the note was protested for non-payment, and notice given to Bassenhorst. Wilby & Wald were retained, and acted as the attorneys of Armstrong in his contest with the general creditors. The matter was finally determined in his favor, which made it necessary for Wilby to look to the indorsement of Bassenhorst for payment of the note; whereupon the note was presented for the first time for payment, and notice of non-payment given as before stated. Though it be admitted that, as a question of law, the defendant had the right to show by parol that he was not to be held upon his indorsement, and that such an issue was made by the pleadings, still there was no error in the court rejecting his simple understanding as to the matter. Nothing was said or done during the transaction that would warrant the inference that

such was the understanding of both parties, and, unless such was the case, the understanding of one could not affect the other. The question whether, upon the facts, it was the intention that Bassenhorst should, in any event, be liable upon his indorsement, will be considered hereafter in connection with the claim of Wilby, that demand and notice was not required, or had been waived; because they will be found, so far as the evidence is concerned, to be nearly related.

The real question in the case is one upon which it seems to have been disposed of in the court below, and that is whether the demand was made upon the makers of the note in a reasonable time; for the notice, having been immediately given, was reasonable, if the demand was. That demand and notice, unless waived, were required to complete the liability of Bassenhorst on his indorsement, although the makers were known to be insolvent, admits of little doubt. 1 Pars. Cont. 279; 1 Pars. Notes & B. 446. A promissory note payable to one or his order is none the less negotiable because overdue. After its maturity it can be no longer transferred so as to deprive the maker of any defense he may have against the original holder. But this is the principal, if not the only, effect which maturity has upon the character of such paper. It can still be transferred so that the transferee will take the legal title; and it may be indorsed, and when indorsed, unless without recourse, the indorser becomes liable to the indorsee, if the note is presented to the maker for payment in a reasonable time, and notice is given the indorser, in case of non-payment. 1 Pars. Cont. (5th ed.) 254-256; Leavitt v. Putnam, 3 N. Y. 494.

The legal effect of indorsing an overdue promissory note, negotiable in form, is generally held to be the equivalent of an inland bill of exchange, drawn by the indorser on the maker of the note payable to the indorsee at sight or on demand; and, by its analogy in this regard, the duty of the indorsee of such a note, if he would hold the indorser, is generally determined. Patterson v. Todd, 18 Pa. St. 426. As the duty of the holder of such a bill is to present it for payment in a reasonable time, a like duty devolves upon the indorser of such a note. Thus it is said in Tyler v. Young, 30 Pa. St. 144: "The indorsement of a note, due or not due, always expresses a conditional as opposed to an absolute obligation. The indorsement of a note, overdue, has been invested by the modern decisions with a very distinct character. Leidy v. Tammany, 9 Watts, 353. It is a bill of exchange drawn upon the party primarily liable, payable at sight. In this theory, the necessity of demand and notice is an essential element. Not notice on a given day, as in the case of a maturing note—possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed—but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence." As to what is a reasonable time has been regarded as a question of some difficulty. Daniel, Neg. Inst. § 606. But in a case like this the only reasonable rule that can be adopted is to require due dilligence in presenting the note to the maker for payment. It is said in one case (Addis v. Johnson, 1 Vt. 136), "if the indorsement be made after the note falls due, the demand of payment must be made as if the note fell due the day of the indorsement." But the general and better rule is one just stated. Tyler v. Young, *supra;* Berry v. Robinson, 9 Johns. 121; McKinney v. Crawford, 8 Serg. & R. 351; 1 Pars. Notes & B. 381, and notes; Daniel, Neg. Inst. §§ 605, 611, 996; Light v. Kingsbury, 50 Mo. 331.

Where a thing is required to be done, and may be done presently, a reasonable time in which to do it necessarily excludes any delay that in the exercise of reasonable diligence could have been avoided; so that a reasonable time in which to fix the liability of the indorser of an overdue promissory note should be such as, under the circumstances, will enable the holder, in the exercise of due diligence, to present it for payment; and any delay that may, by the exercise of such diligence, be avoided, should be treated as negligence, and deprive the holder of the right to look to the indorser. Where the facts are in dispute it is, as in similar controversies, a question for the jury to determine whether the note was presented in a reasonable time to the maker for payment so as to bind the indorser; but, where they are ascertained, it is a question for the court, and cannot properly be submitted to the jury as a question of fact. Walker v. Stetson, 14 Ohio St. 89, 1 Pars. Notes & B. 339; Daniel, Neg. Inst. § 612. Here all the material facts were ascertained. The parties resided in the same city. The note was indorsed on the thirtieth of July, and was not presented for payment until the twenty-first of November following. The delay in the settlement of the assignment caused by the litigation between creditors was no impediment to presenting the note to the makers for payment, and giving notice of non-payment. Such notice might have been of value to the indorser, but, whether so or not, was immaterial to the duty of presentment. In a few days after the determination of this litigation made it apparent that the holder would not be paid from the funds in the hands of the assignee, the note was presented to the makers for payment, and notice of non-payment given; and there is no showing why, in the exercise of the same diligence, it could not have been presented for payment with the same promptitude after the indorsement.

Whether the presentment of a note due on demand has been delayed for such a period as, by becoming dishonored, to be open to defenses of the maker against the original holder, is not the same as the question whether it has been presented in due time to bind an indorser. When such an instrument has been transferred by indorsement, it would, in the opinion of a modern

author, become, "by the very act of indorsement, a draft by the indorser upon the maker; and the indorsee holding it should regard it, as it is in fact, a demand through him for the amount due the indorser. And it should, therefore, be presented immediately, subject only to such qualifications as apply to bills payable at sight" (Daniel, Neg. Inst. § 610), and still more is this true as to a bill payable on demand (*Id.* § 605), the analogue, as before shown, of the indorsement of a promissory note after maturity. We are, therefore, clearly of the opinion that the note was not presented for payment to the makers in the requisite time to charge the defendant below as an indorser of it.

This brings us to the question based on the claim that there was a waiver of demand and notice, and that of the defendant that he was not to be bound upon his indorsement. It seems that, consistently with the contract of indorsement, when it is in blank, either fact may be shown by parol; but where it is not, and the offer is to show that a party was not to be bound by his indorsement, there is, upon principle, much question as to the admissibility of such evidence. There is less, however, as to the right to show a waiver of demand and notice. Barclay v. Weaver, 19 Pa. St. 396; Morris v. Faurot, 21 Ohio St. 155; Hudson v. Wolcott, 39 Ohio St. 618; 1 Pars. Notes & B. 584, and cases cited in notes; Daniel, Neg. Inst. § 717, *et seq.*

The two following cases illustrate the distinction: Thus, in Dye v. Scott, 35 Ohio St. 194, it was held that parol testimony is competent as between parties to prove that the indorsee, at the time of indorsing a note, waived demand and notice; while it is held in Cummings v. Kent, 44 Ohio St. 92, 4 N. E. Rep. 710, that such evidence is not admissible on the part of the drawer as against the payee; that he was not to be liable as drawer, although the relation of drawer and payee is, in commercial law, the same as that of indorser and indorsee.

But the question of waiver must be distinguished from the cases where demand and notice are excused. A waiver ordinarily results from such acts or words of a party as import an agreement to that effect; while the grounds for an excuse are derived from circumstances that would make it inequitable or unjust to insist on the requirement. 1 Pars. Notes & B. 521. Thus a demand is excused where the drawer had no funds in the hands of the drawee, or where the holder is prevented by unavoidable necessity from making a demand and giving notice in the time required by law; but the cases are few, if any, in which the indorsee will be excused, in the absence of a waiver or the existence or unavoidable necessity, from making demand and giving notice An exhaustive discussion on the subject will be found in Parsons on Notes and Bills, § 7, ch. 11, "Excuses for Absence of Demand of Payment," and chapter 13, "Excuses for Want of Notice."

As between the holder of negotiable paper and the prior parties thereto, it is now well settled that the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of demand. And the rule is the same whether the payor becomes insolvent between the time of indorsing the note and its maturity, or is insolvent before and at the time of the indorsement, and his insolvency is known to the indorser when he puts his name upon the note. 1 Pars. Notes & B. 446. "The reason," says the author, "is to be found in the stringency of the rule requiring demand, coupled with the fact that it is possible that the note may still be paid by the assistance of friends or otherwise." The same author, in his work on Contracts, vol. 1, p. 270 (5th ed.), note *c*, observes: "The fact that at the time of the indorsement the indorser had reason to believe, and did believe, that the maker would not pay, does not dispense with the necessity of due notice to him of the maker's default;" citing Denny v. Palmer, 5 Ired. 610; Oliver v. Munday, 3 N. J. Law, 982; Allwood v. Haseldon, 2 Bailey, 457—the latter being a case where the note was indorsed after maturity. See, also, Gray v. Bell, 2 Rich. 67; 2 Daniel, Neg. Inst. §§ 1171, 1172, and cases cited.

It is claimed, however, on the authority of Hudson v. Wolcott, 39 Ohio St. 618, that demand for payment and notice of dishonor were not required in this case. That case is very different from this one. There the indorser, as the court finds, has assented to an extension of the time of payment for thirty days, and afterwards for sixty days. The court rightly held that under these circumstances demand and notice were not required; for an extension of the time of payment is uniformly held to constitute a waiver of demand and notice; and it is immaterial in this regard whether the waiver takes place before or after the default. 1 Pars. Notes & B. 582; Dye v. Scott, 35 Ohio St. 194; Forster v. Jurdison, 16 East, 105; Bank v. Moore, 37 N. H. 539; Ridgway v. Day, 13 Pa. St. 208; Barclay v. Weaver, 19 Pa. St. 396; 2 Daniel, Neg. Inst. § 1106.

A similar distinction exists in Kyle v. Green, 14 Ohio, 490. There the ordinary contract of indorsement had been superseded by an agreement that Kyle, the indorsee, should use due diligence to collect the note, and that Green, the indorser, would pay it if, after the use of due diligence, it could not be collected. And so the court held that Green was not entitled to notice; that his liability depended upon the use of due diligence by the indorsee to make collection. It is also generally held that if the indorser holds indemnity against his liability he is not entitled to notice; and it was upon this ground that, in the subsequent case between the same parties (14 Ohio, 495), the indorser was held liable without due demand and notice. We have before given the substance of the transaction between the parties as disclosed by the evidence, and are unable to find in it one element, recognized by the decided cases (1 Pars. Notes & B. 584), tending to

show a waiver by the indorser of demand and notice. There was no express waiver in the indorsement; no promise by the indorser to pay the note at the time or subsequent to the indorsement; no agreement to extend the time of payment, nor request by the indorser for forbearance.

Any inference that may be drawn from what occurred, taken in connection with the circumstances of the transaction, tend quite as much to support the claim of Bassenhorst, that his only purpose in indorsing the note was to transfer the title, and that he was not to be liable upon his indorsement, as the claim of Wilby that there was a waiver of demand and notice; and if, as a matter of fact, Bassenhorst did not suppose that he was to be liable as an indorser, it is difficult to see how he could have intended to waive demand and notice. To have intended the latter, he must have contemplated the former. But we think neither claim is supported by the evidence. The note, though overdue, was still the subject of a contract of indorsement, the terms of which are implied by the law from the act of the indorser placing his signature on the back of the note. It is true these terms may be waived by the agreement of the parties.

The indorser may stipulate against further liability, and this is usually done by indorsing "without recourse;" and the indorsee may stipulate against the requirement of him, and this is usually done by the formula, "Demand and notice waived." Here the indorsement on the note is unrestricted; and during the entire transaction no reference was made by either party as to the liability of Bassenhorst or his indorsement, and both were equally silent as to the requirement of demand and notice. Under these circumstances the liability of the indorser and the duty of the indorsee must be regarded as fixed by the law. The liability of the indorser, Bassenhorst, depended upon the note being presented for payment in a reasonable time, and notice to him of dishonor. Such presentment was not made, and the jury should have been directed to return a verdict for the defendant below.

Judgment of the superior court reversed, and judgment rendered for the defendant below.

NOTE.—The rules of law involved in the principal case are very fully and clearly stated, and they seem to be in perfect harmony with the general current of authority.

The authorities uniformly sustain the rule, that where a negotiable instrument is indorsed after maturity, payment must be demanded of the party liable within a reasonable time, and in case of refusal notice is to be given to the indorser immediately, that he may be held. This is regarded in much the same light as a note payable on demand.[1]

As between indorser and indorsee, such note is to be treated as a note on demand, dated at the time of the transfer, so far as demand and notice are concerned.[2]

The indorsement of a negotiable note after maturity is equivalent to the drawing of a new bill of exchange at sight, and the same diligence in making demand of and giving notice is required to charge the indorsers.[3]

Hence, it follows, that the indorser is liable only upon proof of a demand upon the maker within a reasonable time, and immediate notice of default.[4]

Thus, it is seen, that in this country the determination as to presentment, etc., of notes of the character under consideration proceed upon the same general principles as those which control bills and notes payable on demand. Such, at least, is the weight of authority; yet some cases maintain that the rules should be less stringent,[5] while others insist that a stricter rule should apply.[6]

This doctrine is very satisfactorily presented by the Supreme Court of Pennsylvania, as follows: Where a note is indorsed *before it is due*, the holder must present it for payment at maturity, and in case of default must give immediate notice of the dishonor. But *after the note becomes due* it is payable whenever the holder chooses to demand it, and for this purpose an action at law is a sufficient demand, as between the maker and holder. Like a contract for the payment of money, where no time of payment is specified, it is legally payable presently. So that where such a note is indorsed, the indorser still stands in the condition of the drawer of an inland bill of exchange; and we refer to the note, as before, for the purpose of ascertaining the amount, and the time and place of payment. The time of payment having passed, the note is, in law, payable on demand, and this shows that the indorsement is to be considered as if made upon a new note payable upon demand, and the legal effect of it is precisely the same as if the indorser had drawn an inland bill of exchange upon the maker, payable at sight. It is the duty of the holder of such a bill to present it for payment within a reasonable time, and if the bill is dishonored to give immediate notice thereof to the drawer. In the case of an indorsement of a note overdue, the holder is, in like manner, bound to present it for payment within a reasonable time, and in case of non-payment to give immediate notice of the dishonor to the indorser; otherwise, the latter is discharged from liability. This doctrine is fully sustained by the authorities.[7]

There is no precise time when a note payable on demand is deemed to be dishonored.[8] Where a note payable on demand is indorsed within a reasonable time after its date, it has been held in the United States that the indorsee had all the rights of an indorsee receiving a negotiable instrument before it becomes due. But if not indorsed within a reasonable

[1] Graul v. Strutzel, 53 Iowa, 712; McKelver v. Kurtland, 33 Iowa, 348; Pryor v. Bowman, 38 Iowa, 92; Blake v. McMillen, 33 Iowa, 150; Bank v. Orvis, 40 Iowa, 332; Greeley v. Hunt, 21 Me. 455; Powers v. Nelson, 19 Mo. 190; Colt v. Barnard, 18 Pick. 260; Sanborn v. Southard, 25 Me. 409; Van Hosen v. Van Astyne, 3 Wend. 75; 1 Parsons on N. & B, 382; 1 Dan. Neg. Inst. (3d ed.) § 611.

[2] Goodwin v. Davenport, 47 Me. 116; 1 Parsons on N. & B. 381.

[3] Light v. Kingsbury, 50 Mo. 331; Davis v. Francisco, 11 Mo. 572; Moody v. Mack, 43 Mo. 210; Berry v. Robinson, 9 Johns. 121; McKinney v. Crawford, 8 Serg. & R. 351.

[4] Patterson v. Todd, 18 Pa. St. 426, 432; Eifert v. Deasondre, 1 Comst. 70; Agan v. McManus, 11 Johns. 180; Leavitt v. Putnam, 3 Comst. 494.

[5] Hall v. Smith, 1 Bay (S. C.), 330; McKinney v. Crawford, 8 Serg. & R. 351; Rugby v. Davidson, 2 Comst. 33.

[6] Aldis v. Johnson, 1 Vt. 136; Nash v. Harrington, 2 Atk. 9; 1 Dan. Neg. Inst. (3d ed.) § 611; 1 Parsons on N. & B. 382.

[7] Patterson v. Todd, 18 Pa. St. 426, 431.

[8] Losse v. Dunklin, 7 Johns. 70.

time, it will be considered as overdue and dishonored.[9] What is such reasonable time, has not been precisely settled; though it is clear that such a note is to be considered to be overdue and dishonored in a year, or even eight or nine months after its date, but not overdue a few days after its date.[10]

So, what is meant by a presentment within a "reasonable time" in the case of a note indorsed and transferred after maturity, depends upon the circumstances of each particular case.[11] The question has been raised on almost every conceivable period of time, from "a few days" to eighteen months, but the precise number of days, weeks or months, even which will constitute "reasonable time," has never been, although a question of law, judicially determined, but is made to depend upon circumstances as variable and uncertain as are the transactions and characters of men, and finally to be determined by the discretion, not to say, caprice of the court.[12]

Concerning this question, it has been said that one decision goes but little way in establishing a precedent for another.[13] A few illustrated cases will be given: In Sanbourn v. Southard,[14] the indorsement was in blank, and was made on the last day of January or the first of February. Demand was made about, or a little past, the middle of March next following the indorsement and payment refused, and notice given to defendant the same day. The court would not say that the demand and notice were not within a reasonable time.

In one case it was held that a note, on demand, drawn in England and put in suit within one year from its date, was not dishonored.[15] So a note indorsed after maturity and transferred on September 20th, followed by demand and notice on October 13th next—a period of twenty-three days—was held to be within a reasonable time.[16] But it has been held that a period of one month between the indorsement and the presentment,[17] or over two months, no excuse appearing,[18] or seven months and seventeen days,[19] or eight months,[20] or eighteen months,[21] is not a reasonable time.

Many cases have held that the question as to reasonable time was one of fact for the jury.[22] Other cases hold that it is a question of law for the court.[23] Yet it is said that "neither is strictly correct. It is a mixed question of law and fact in most cases, to be determined upon hypothetical instructions of the court, like all other contested matters."[24] And this is the holding of the principal case.

Notice immediately to the indorsers of non-payment means, at farthest, the next day after default, where the parties reside in the same place. The same rule applies as in case of a note indorsed before due.[25]

9 Bailey on Bills, 134.
10 Bailey on Bills, 136.
11 Goodwin v. Davenport, 47 Me. 112.
12 Goodwin v. Davenport, 47 Me. 117.
13 Seaver v. Lincoln, 12 Pick. 267.
14 25 Me 409.
15 Hendricks v. Judah, 1 Johns. 319.
16 Goodwin v. Davenport, 47 Me. 112.
17 Ranger v. Carey, 1 Metc. 369.
18 Light v. Kingsbury, 50 Mo. 331.
19 Carlton v. Bailey, 7 Fost. (N. H.) 230.
20 Field v. Nickerson, 13 Mass. 131.
21 Freeman v. Haskins, 3 Cains, 368.
22 Eccles v. Ballard, 2 McCord, 388; Gray v. Bell, 2 Rich. 67; Goupy v. Harden, 7 Taunt. 159; Stroker v. Graham, 4 M. & W. 721.
23 Field v. Nickerson, 13 Mass. 131; Himmelman v. Hotaling, 40 Cal. 111; Sylvester v. Crapo, 15 Pick. 92; Freeman v. Haskins, 2 Cains, 368; Sice v. Cunningham, 1 Cow. 408; Goodwin v. Davenport, 47 Me. 117.
24 1 Dan. Neg. Inst. d ed.) 11.
25 Graul v. Strutzel, 53 Iowa, 712; McKelver v. Kirtland, 33 Iowa, 348; Lockwood v. Crawford, 18 Conn. 361; Rice v. Wesson, 11 Metc. 400; Field v. Nickerson, 13 Mass. 131; Berry v. Robinson, 9 Johns. 121; Bishop v. Dexter, 2 Conn. 419; Brenzer v. Wightman, 7 Watts & Serg. 264; Poole v. Tolleson, 1 McCord, 199; Course v. Shackleford, 2 Nott & McCord, 283.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION—Contract for Benefit of Third Party.—— A contract, by which A works mines and turns over the "clean up" of the mines to B, to be applied by B to defraying the expenses of mining and working the mines, does not authorize, under California law, a creditor of A for such work to sue B.—*Chung Kee v. Davidson*, S. C. Cal., Sept. 30, 1887; 15 Pac. Rep. 100.

2. ALTERATION—Fraudulent — Note — Mortgage.—— Where a note, executed by a husband and wife, was secured by a mortgage on their homestead, and the husband, just prior to delivery, fraudulently changed the provision about interest from date to due, but upon being detected, corrected the note, the mortgagee can foreclose the mortgage.—*Osborn v. Andrees*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 153.

3. APPEAL—Bond—Approval of Bond. —— The authority of a clerk of a circuit court, in Illinois, to approve an appeal bond does not extend to determining the sufficiency of the securities thereon.—*Brownell v. Leaton*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 241.

4. APPEAL— Costs — Retaxing. —— A judgment for costs will not be reviewed on appeal till a motion to retax them has been passed on by the trial court.—*Wilkinson v. Carter*, S. C. Neb., Oct. 12, 1887; 34 N. W. Rep. 351.

5. APPEAL—Final Order—Striking Out.—— An order striking the petition from the files cannot be appealed from, in the absence of a judgment.—*Welch v. Calhoun*, S. C. Neb., Oct. 6, 1887; 34 N. W. Rep. 348.

6. APPEAL—Interlocutory Order—Review.——No appeal lies from an interlocutory order after judgment rendered, out on appeal from the judgment, such order, when involving the merits and affecting the judgment, is reviewable.—*Goldmark v. Rosenfeld*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 228.

7 APPEAL—Interlocutory Proceedings.——In a bastardy proceeding, defendant filed interrogatories for plaintiff to answer, to which plaintiff excepted and was sustained by the court: *Held*, that an appeal therefrom could not be taken.—*State v. Arns*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 329.

8. APPEAL — Jurisdictional Amount.—— An appeal, where the amount in controversy is only $80, and only questions of fact are involved will be dismissed, though it was certified up as involving a question of law.—*Riddle v. Fletcher*, S. C. Iowa, Oct. 7, 1887; 34 N. W. Rep. 290.

9. ASSAULT AND BATTERY — Officers. —— Where a party, against objections of the owner, makes a trench through the land, to connect his premises with a public sewer crossing the first land, not having first obtained the proper consent from the city authorities for making such connection, he and police officers are trespassers in removing the owner of the land from such trench, of which she had taken possession.— *Zube v. Weber*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 264.

10. ASSAULT—Criminal Practice.——Under an indictment for an assault with a deadly weapon and with intention to inflict great bodily harm, a defendant may be convicted of a simple assault, that being an indictable misdemeanor. — *Kennedy v. People*, S. C. Ill., Sept 26, 1887; 13 N. E. Rep. 213.

11. ASSIGNMENT— For Creditors — Attachments. —— Where a firm, in failing circumstances, instigated certain creditors to attach them, and a short time after filed a bill for a dissolution of the partnership and a receiver, all their property being then under attachment, but a large amount of outstanding obligations being still due them, such action did not constitute a voluntary assignment for creditors, so as to invalidate the attachments.—*Landauer v. Vieter*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 229.

12. ASSUMPSIT—Evidence.——After plaintiff has testified in *assumpsit* that he performed work and labor for the defendant, it is proper to ask what his services were worth.—*McDonald v. McDonald*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 276.

13. ATTACHMENT——Sale—Intervenor — Amending Petition.——After final judgment in attachment, wherein the rights of the intervenor were settled, and the property has been sold, it is too late to amend the intervenor's petition, setting up new issues and new causes of action.—*Bicklin v. Kendall*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 283.

14. BILL OF LADING—Connecting Carriers.—— When the bill of lading specifies that the goods are only to be delivered on a bill of lading, and the place of delivery is beyond the line of the receiving carrier, such carrier is relieved from all liability on that point by delivering the goods to the connecting carrier, with full instructions in that respect.—*Rickerson, etc. Co. v. Grand Trunk, etc. Co.*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 269.

15. BILLS AND NOTES—Defenses—Evidence.——A demurrer to the evidence of the maker of a promissory note in the hands of a *bona fide* holder is properly sustained when there is no testimony showing want of consideration or fraud, these being the only defenses set up in the answer.—*Lowe v. Higginbotham*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 151.

16. BOUNDARIES — Mistake — Estoppel. —— Where a party divides up his ground and sells it to different parties, reserving an alley through the center, and the grantees occupy the ground as platted for fifteen years, but it is afterwards found that the lines are wrong, which places the alley in the wrong position, there is no estoppel between the owners in asserting the true lines of the alley.—*Switzgable v. Worseldine*, S. C. Utah, Oct. 17, 1887; 15 Pac. Rep. 144.

17. CARRIER—Freight—Damages to Cargo—Tender.—— A vessel which delivers a part of its cargo in a damaged condition is entitled only to the freight, less the damages sustained by the cargo. A demand of the whole freight from the consignee relieves him from the necessity of making a tender of the amount really due.—*The Tangier*, U. S. D. C. (N. Y.), June 24, 1887; 32 Fed. Rep. 330.

18. CARRIERS—Freight—Unloading. —— The liability of a common carrier, as such, for grain transported on its cars does not cease till the cars have been placed in a safe and convenient place for unloading.—*Independence M. Co. v. Burlington, etc. Co.*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 320.

19. CERTIORARI—Recanvassing Votes— Licenses.—— The action of a village council in recanvassing the votes cast three months before is without effect, and a writ of *certiorari* to review such act will not be granted, nor under such a writ can the granting of a license to sell liquors by such council be reviewed.— *Holden v. Lamberton*, S. C. Minn., Oct. 15, 1887; 34 N. W. Rep. 336.

20. CERTIORARI — Record Evidence. —— In certain proceedings, record evidence should be presented by certified or authenticated copies, and not by mere recitals. —*Hewitt v. Probate Judge of Oakland Co.*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 248.

21. CHATTEL MORTGAGE—Levy—Lien. —— A levy on mortgaged chattels, where the mortgage is not shown to be invalid, constitutes no lien on the chattels for their value in excess of the mortgage debt, and a release of the levy discharges any lien arising therefrom, though the plaintiff authorizes the release without prejudice to his lien.—*McConnell v. Denham*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 298.

22. CIVIL RIGHTS—Barber Shop—Indictment. —— An indictment against a barber for refusing to shave a person should allege that there was no good reason, and that immediately afterwards the defendant began to shave others.—*State v. Hall*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 315.

23. CONTEMPT—Publication — Montana Court. —— A publication in a paper, published where the court is sitting, stating falsely that certain parties had wagered that, owing to the influence of adverse claimants, the court would reverse its former decision, is a contempt of court at common law. The Supreme Court of Montana is not a United States court, within the meaning of the law defining the power of United States courts to punish contempts.—*Territory v. Murray*, S. C. Mont., Oct. 15, 1887; 15 Pac. Rep. 145.

24. COLLISION.——Circumstances stated under which the court held the schooner in fault for a collision between her and a steamer, she having violated the rule that in such cases sailing vessels must hold their course and steamers must keep out of their way.—*The Kanawha*, U. S. C. C. (N. Y.), August 17, 1887; 32 Fed. Rep. 240.

25. COLLISION.——A sailing vessel when hove to in a fog should ring a bell, and not blow a horn.— *The Alfredo*, U. S. C. C. (N. Y.), August 16, 1887; 32 Fed. Rep. 240.

26. COLLISION—Right of Way.—— Circumstances in full under which the court settled the fault and responsibility respectively of two vessels which came into collision with each other. A vessel that has the right of way must, nevertheless, stop and back, necessary to avoid a collision.—*The C. H. Scuff*, U. S. D. C. (N. Y.), June 21, 1887; 32 Fed. Rep. 237.

27. CONTRACTS—Joint—Alteration.——An agreement, written on a lease at the time of its execution, wherein A agrees to pay the rent if the lessee does not, makes the two instruments a joint obligation, on which a joint action may be brought. A subsequent agreement by the lessor with the lessee to reduce his rent does not re-

lease A.—*Preston v. Huntingdon*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 279.

28. COPYRIGHT—Records—Infringement — Injunction. ——A compilation of public records of battles may be copyrighted. The holder of the legal title may sue for infringement. Whether a preliminary injunction will be granted depends upon the discretion of the court, in view of all the circumstances of the case.—*Hanson v. Jaccard, etc. Co.*, U. S. C. C. (Mo.), Sept. 19, 1887; 32 Fed. Rep. 202.

29. CORPORATIONS — Advances by Directors—Sales—Trusts.——Where, by agreement with a corporation, two of its directors advance money to redeem its property from sale, taking a deed in their names from the marshal after sale on execution, said money to be returned to them, such deed must be held to be a mortgage, and the agreement may be proved by parol, and in a suit to have the deed declared a mortgage, brought years after, the directors should be allowed their reasonable expenditures in developing and improving the property.—*Wasatch M. Co. v. Jennings*, S. C. Utah, Sept. 2, 1887; 15 Pac. Rep. 65.

30. CORPORATION—Seal—Contract.——A contract of a corporation to purchase land will be valid as a simple contract, if its seal thereon be rejected as unauthorized. —*St. Paul L. Co. v. Dayton*, S. C. Minn., Oct. 18, 1887; 34 N. W. Rep. 335.

31. CRIMINAL LAW—Burglary—Stolen Goods.——The finding of recently stolen goods in the possession of the defendant is not alone sufficient to support a conviction of burglary.—*People v. Flynn*, S. C. Cal., Sept. 28, 1887; 15 Pac. Rep. 102.

32. CRIMINAL LAW—Larceny—Possession of Goods.—— An instruction, where defendant admits the possession of the stolen property, the jury are justified in finding him guilty, unless he has satisfied them that he did not steal it, is erroneous.—*State v. Kirkpatrick*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 301.

33. CRIMINAL LAW—Larceny—Second Offense—Punishment.——Under California law, the court, on a verdict of guilty of petty larceny, may impose the heavier punishment provided for a second offense, when it is so charged in the information, and is confessed by the defendant.—*Ex parte Young Ah Gow*, S. C. Cal., Sept. 26, 1887; 15 Pac. Rep. 76.

34. CRIMINAL LAW — Manslaughter — Indictment.—— An indictment for manslaughter, charging defendant with assaulting a child, and with wilfully and wrongfully doing acts which exposed the child to inclement weather for the purpose and with the result of causing its death, sufficiently charges an indictable offense.— *State v. Behm*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 319.

35. CRIMINAL LAW—Murder—Evidence—Accomplice—Statute.——Construction of criminal code of Kentucky. When a co-defendant is a competent witness for the State. Ruling as to corroborating evidence necessary to sustain the testimony of an accomplice.— *Patterson v. Commonwealth*, Ky. Ct. App., Oct. 6, 1887; 5 S. W. Rep. 387.

36. CRIMINAL PRACTICE — Defendant—Cross-examination.——Where the answers of the defendant to the questions objected to added nothing material, but only made clearer some of the statements precisely made voluntarily by him without objection, there was no violation of the law against cross-examining a defendant in a criminal case as to matters on which he was not examined in chief.—*People v. Sutton*, S. C. Cal., Aug. 29, 1887; 15 Pac. Rep. 86.

37. CRIMINAL PRACTICE—Former Convictions—Plea of Guilty.——Where a defendant is charged with larceny and with four former convictions of the same offense, and pleads guilty as to the former convictions, it is error to read to the jury the part of the indictment referring to the former convictions, or to offer any evidence on the subject.—*People v. Meyer*, S. C. Cal., Oct. 6, 1887; 15 Pac. Rep. 95.

38. CRIMINAL PRACTICE — Instructions.——Where an instruction states that, if the jury believes certain facts then they will find the defendant guilty of murder, omitting the elements of intent and premeditation, it is prejudicial error, which is not cured by other instructions fully and properly defining the offense.—*People v. Williams*, S. C. Cal., Sept. 30, 1887; 15 Pac. Rep. 97.

39. DEEDS—Covenants—Use of Streets.——A deed to a lot by the original proprietor of an addition to a city, which contains a covenant for quiet and peaceable possession of the lot and its appurtenances, includes the use and enjoyment of the full width of the street on which the lot abuts.—*Molitor v. Sheldon*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 231.

40. DEED—Record—Bona Fide Purchaser.——D conveys lands to A, but subsequently conveyed them to B by deed which was recorded before the deed to A; B conveyed to C, whose deed was recorded after D's deed to A: *Held*, that C must prove that B was an innocent purchaser for value and without notice.—*Gardner v. Early*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 311.

41. DRAINAGE—Drainage District—Quo Warranto.—— The enlargement of a drainage district cannot be questioned by a bill to enjoin the collection of an assessment on lands included within the enlarged limits of the district. The remedy should be by *quo warranto*. —*Evans v. Lewis*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 246.

42. DEED—Writing not Under Seal —Reference.—— By deed, parties agreed to exchange lands, but the terms were not specified, but another writing not under seal, referring to the deed, specified the terms. *Held*, that an action of covenant would lie to recover the money therein specified.—*Horner v. Ebersale*, S. C. App. Va., September Term, 1887; 3 S. E. Rep. 439.

43. ELECTIONS—Municipal—Courts.——Where a common council has jurisdiction to judge of the election and qualifications of its members, the courts will still have concurrent jurisdiction thereof, unless it is expressly taken away by law. The courts have that jurisdiction in the case of the city of Milwaukee.—*State v. Kempf*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 226.

44. ELECTIONS — Separate Propositions — Majority of Votes.——Where a proposition is submitted to the voters at a general city election, and but one poll-list is made, and it is practically but one election, a majority vote on such proposition must be a majority of all the votes cast at such election.—*State v. Bechtel*, S. C. Neb., Oct. 6, 1887; 34 N. W. Rep. 342.

45. EQUITY — Specific Performace — Certainty. —— Where a party in consideration that a real estate agent would secure the location of a factory in a certain town, agreed to give to said agent as commissions "five acres of land near said works." *Held*, that the agreement was not sufficiently definite to authorize a decree for a specific performance.—*Hamilton v. Harvey*, S. C. Ill., Sept. 20, 1887; 13 N. W. Rep. 210.

46. EQUITY—Specific Performance —Married Woman. ——Where a man and wife contract with another, to convey to him a part of this homestead when they obtain the legal title, and he pays them the purchase money, and they put him in possession, and with their knowledge he makes valuable and lasting improvements thereon, a court of equity will compel the wife upon her refusal to join in the deed to him after they have obtained the legal title.—*Perrine v. Mayberry*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 172.

47. ESTOPPEL—Mortgage—Eminent Domain—Equity—Practice. —— Where an act is done or a statement made by a party which he cannot contradict without fraud on his part, and injury to others who have relied upon his act or statement, such act or statement estops such party. Rulings on the sujects of eminent domain, mortgage, redemption, and equity practice.—*Union, etc. Co. v. Slee*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 222.

48. EVIDENCE — Expert Testimony — Accused as Witness.——Expert testimony should be received with caution and regarded merely as matter of opinion. No presumption arises against a person accused of crime because he does not testify in his own behalf.—*United*

States v. Pendergast, U. S. C. C. (Mo.), April 11, 1887; 32 Fed. Rep. 198.

49. EVIDENCE — Judicial Notice — Criminal Practice. ——The court will take judicial notice of the fact that Chicago is in Cook county, Illinois. Objections to record evidence of a former conviction, that it does not appear that defendant was the party so formerly convicted, if not made in the trial court, will not be considered upon appeal.—*Sullivan v. People*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 248.

50. EVIDENCE—Registers of Religious Societies—Identification.——A register kept by a religious society, which shows the baptism and afterwards the death of a certain party, but the entries are in different hand-writing, is not evidence to show that the same party is referred to in the absence of further evidence.—*Meconce v. Mower*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 155.

51. EXCEPTIONS—Bill of—Evidence.——A bill of exceptions should state that it contains all the evidence. It is not proper to use the word "testimony" instead of the word "evidence."—*Kleyla v. State*, S. C. Ind., Oct. 13, 1887; 13 N. E. Rep. 255.

52. EXECUTION — Alias — Quieting Title.——An alias execution issued without authority from the judgment creditor is valid, and a sale under it is good. A judgment creditor cannot avoid consummated sheriff's sale on the ground of irregularities by clerk or sheriff. One who desires to quiet title as owner is not entitled to relief by showing his right to partition.—*Johnson v. Murray*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 273.

53. EXECUTORS — Appointment — Removal. —— The court at the instance of a non-resident heir may revoke letters testamentary or of administration and appoint an administrator, if it deems the rights of those interested require such action.—*Reilly v. Clark*, S. C. Ariz., Oct. 22, 1887; 15 Pac. Rep. 141.

54. EXECUTORS—Failure to Pay Taxes—Interest.—— An administrator is chargeable with the value of real property lost to the estate by his failure to pay taxes and installments of purchase money, when he had sufficient money on hand, and also with interest on money mingled with his own money and omitted from his account.—*In re Harteman*, S. C. Cal., Oct. 6, 1887; 15 Pac. Rep. 121.

55. EXECUTORS—Sale—Publication.——A sale of decedent's property at the instance of creditors is valid when the notice thereof was published only once a week for three successive weeks in a daily paper, by order of the court.—*In re Cunningham*, S. C. Cal., Oct. 7, 1887; 15 Pac. Rep. 136.

56. EXEMPTION—Attachment—Farmer.——Where defendant is not farming at the time, it is error for the court to direct a verdict in his favor as to the property being exempt as that of a farmer, though he has been a farmer; it is a question for the jury.—*Hickman v. Cruise*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 316.

57. FRAUD—Statute of—Dower—Trust.——There is no dower in trust estates. The defense of the statute of frauds is personal to the party making the promise, and cannot be collaterally set up by a third person to impeach a trust which has been created by parol.—*King v. Bushnell*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 245.

58. FRAUDS—Statute of—Another's Debt.——A verbal promise by A to pay B's debt to C, where A is not substituted as the debtor and B discharged, is void. So is A's verbal acceptance of B's order on him therefor in favor of C.—*Pfaff v. Cummings*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 281.

59. FRAUDS—Statute of—Land—Gift of — Parol.——A parol gift of land, accompanied by possession and followed by valuable improvements, is forfeited in equity.—*Dawsen v. McFaddin*, S. C. Neb., Sept. 28, 1887; 34 N. W. Rep. 338.

60. FRAUDULENT CONVEYANCE—Insolvency.——Where a father, being insolvent, conveys to his daughter, who is ignorant of his insolvency, a farm, in consideration of money due by the father to the daughter, and her assumption of the incumbrances on the land, it was held that the facts did not warrant a decree setting aside the conveyance as fraudulent.—*Trustees, etc. v. Mason*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 235.

61. GARNISHMENT—Liability—Damages. —— A judgment is not liable to garnishment in a cause where judgment has been taken before the garnished judgment was granted, under Wisconsin laws, when the latter judgment was for personal injuries.—*St. Joseph, etc. Co. v. Miller*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 235.

62. GARNISHMENT—Non-resident.——Where a party's liability is, by the contract, to be discharged in a certain way and at an ascertainable time in a certain State, he cannot be garnished therefor in another State—*Hamilton v. Plumer*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 278.

63. GUARANTY—Action—Defense. —— In a suit on a guaranty, a defense that the principals were not bound by reason of the fraudulent or mistaken representations of the plaintiff, is sufficient.—*Bennett v. Corey*, S. C. Iowa, Oct. 8, 1887; 34 N. W. Rep. 291.

64. GUARANTY—Notice—Husband and Wife—Witness. —— Demand is not necessary before bringing suit upon a guaranty. Want of notice of the non-performance of the contract guaranteed is matter of defense. Circumstances stated under which a wife can give testimony as to her husband's conduct. Ruling as to witness being permitted to refresh his memory.—*Stanley v. Stanley*, S. C. Ind., Oct. 14, 1887; 13 N. E. Rep. 261.

65. HOMESTEAD — Assignment — Statutes.—— Construction of Ohio statutes relative to homesteads and assignments for the benefit of creditors. Rulings upon the effects and operation of those statutes.—*Schuler v. Miller*, S. C. Ohio, Oct. 4, 1887; 13 N. E. Rep. 275.

66. HOMESTEAD—Mortgage—Foreclosure—Death.—— An absolute deed, intended as a mortgage, executed by husband and wife on her property, which had been declared a homestead, to secure his debt, cannot be foreclosed after the husband's death, when no claim has been presented against his estate, under California law. *Bull v. Coe*, S. C. Cal., Sept. 30, 1887; 15 Pac. Rep. 123.

67. INDICTMENT—False Pretenses.—— An indictment for larceny which, in its terms, is good against that offense, both at common law and under the statutes of New York, is, nevertheless, insufficient under the statutes of that State relating to false pretenses.—*People v. Dumar*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 325.

68. INJUNCTION.——Where the body of a deceased person has been buried in a lot provided by his father, his widow has no right to remove it, and the father may prevent such removal by injunction.—*Peters v. Peters*, N. J. Ct. Ch., October, 1887; 10 Atl. Rep. 742.

69. INJUNCTION—Bond—Breach.——A vacation of an injunction on a motion and a dismissal of the cause for lack of prosecution, is a breach of the condition of the bond to pay defendant's damages by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto.—*Kane v. Casgrain*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 241.

70. INSURANCE—Contractor.——A contractor had insured a building for "whom it may concern," and assigned the policy to the owner, there being a contract between them that, in case of loss, the money should be divided between them The building was destroyed by fire: *Held*, that a material man had no right against the owner, to whom the money had been paid.—*Moser v. Donaldson*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 766.

71. INSURANCE—Mutual Benefit—Waiver.——Circumstance stated under which a mutual benefit society waived an informality in the change of a beneficiary and paid the amount to the new beneficiary. *Held*, that the informality so waived could not be set up by a third person.—*Manning v. Ancient Order, etc.*, Ky. Ct. App., Oct. 6, 1887; 5 S. W. Rep. 385.

72. INSURANCE—Risk Increase of. ——Circumstances stated showing a clear violation of the prohibition of increase of risk specified in a policy of fire insurance which being without the consent of the insurer ren-

dered the policy void.—*Mack v. Rochester, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 343.

73. INTOXICATING LIQUORS — Abating Nuisance — Equity—"Due Process of Law."——The statute is constitutional which allows the chancery court to abate a nuisance consisting of a place where intoxicating liquors are sold unlawfully and to punish by fine and imprisonment for disobedience.—*State v. Jordan*, S. C. Iowa, Oct. 4, 1887; 34 N. W. Rep. 285.

74. INTOXICATING LIQUORS—Damages—Statutes—Practice.——Construction of Illinois statutes relative to actions for damages for injuries caused by sale of intoxicating liquors. Circumstances stated under which a widow may recover damages for the death of her husband caused by the sale to him by the defendant of intoxicating liquor. Rulings on the subject of damages and exemplary damages. Rulings on juries, instructions, trials and practice generally.—*Mayers v. Smith*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 216.

75. INTOXICATING LIQUORS—Indictment—Election.——Where an indictment for unlawful sales of intoxicating liquors contains twenty-seven counts, all of which allege a sale of liquor "at the time and place as alleged in count one" to an unknown person, the prosecution must elect on which count they will proceed, or a demurrer will be sustained to all but the first.—*State v. Von Haltzschuherr*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 323.

76. JUDGMENT—Defenses Against.——No defense can be set up against a judgment, which with due diligence could have been interposed in the original suit.—*Snow v. Mitchell*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 224.

77. JUDGMENT—Fraud.——A judgment which is not founded on an actual debt or legal liability will not be upheld against the creditors of the judgment defendant.—*Palmer v. Martindell*, N. J. Ct. Chan., Oct. 18, 1887; 10 Atl. Rep. 802.

78. JUDGMENT — Lien — Limitation. —— A recovered judgment against B, which he assigned to C. D subsequently in a suit against A garnished B, and obtained judgment against B. The lien of D on the judgment in favor of A expired in ten years after its rendition, regardless of the question of the validity of the assignment.—*Virden v. Shepperd*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 325.

79. JUDGMENT — Lien — Record. —— The docket of a judgment, which shows a sale of the land under that judgment, which was a lien on it, is notice of such sale, though the lien index states the judgment has been satisfied.—*Mather v. Jenswold*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 327.

80. JUDGMENT—Res Adjudicata. —— When property owners of a town have filed a bill to enjoin the town from issuing certain bonds and the bill has been dismissed, but by compromise, fewer bonds agreed to be issued other property owners cannot enjoin their issuance. The matter is *res adjudicata*.—*Harmon v. Auditor, etc.*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 161.

81. JUDGMENT — Vacation—Petition.——A petition to vacate a judgment for fraud must set forth the judgment and must fully state the facts constituting the defense.——*Mulvany v. Lovejoy*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 181.

82. JURISDICTION—Assignment—Validity.——Circumstances stated under which a circuit court of the United States will take jurisdiction of the question of the validity of a trust deed although the trustee may have entered upon the duties of his office.—*Gould v. Mullanphy*, U. S. C. C. (Mo.), Sept. 28, 1887; 32 Fed. Rep. 181.

83. JURISDICTION — Federal Courts — License. —— When a State court has obtained jurisdiction of property by seizure under its process, a federal court cannot interfere with such property. An oral license to quarry stone is revocable at the will of the licensor.—*Williams v. Morrison*, U. S. C. C. (Mo.), Sept. 22, 1887; 32 Fed. Rep. 177.

84. JUSTICE OF THE PEACE—Mistake in Time of Trial—Vacating Judgment.——A judgment of a justice rendered before the time set for trial by mistake of the justice, taken advantage of by the plaintiff, may be set aside upon motion with due notice thereof to plaintiff and a new trial granted.—*Barons v. Anderson*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 226.

85. LANDLORD AND TENANT — Distress — Statute.—— Under the distress statutes of Texas, a landlord has a lien for rent of premises on all tenants' property therein, and a purchaser from such tenant takes the property so purchased subject to such lien, due and thereafter to fall due.—*Marsales v. Pitman*, S. C. Tex., Oct. 18, 1887; 5 S. W. Rep. 404.

86. LANDLORD AND TENANT — Lease — Evidence.—— Where a lease is complete upon its face in all its terms, parol evidence is not admissible to show that it does not include the full terms of its surrender and termination of the contract.—*Snowhill v. Reed*, S. C. N. J., February Term, 1887; 10 Atl. Rep. 737.

87. LANDLORD AND TENANT—Rent—Mortgagee in Possession.——A mortgagee foreclosed and at the sale bought in the goods, which were subject to a lien for the rent, which lien in his purchase he assumed, and he also continued in possession of the premises. About this time both the landlord and the mortgagor sold their interests in the lease. *Held*, that the mortgagee was liable for the rent to the vendees of the landlord, and for use and occupation to the vendees of the mortgagor.—*Bolton v. Lambert*, S. C. Iowa, Oct. 8, 1887; 34 N. W. Rep. 294.

88. LANDLORD AND TENANT—Distress.——When one claims property seized under a distress warrant the amount of the landlord's claim, in the absence of fraud, cannot be inquired into. The only question is the validity of the distress warrant and the liability of the property thereto.—*Livingstone v. Wright*, S. C. Tex., Oct. 18, 1887; 5 S. W. Rep. 407.

89. LIMITATION—Statute of—Adverse Possession.—— A married woman's deed, made in 1853, conveying land in Pennsylvania is void. Adverse possession taken of the land under such deed and held for thirty-three years against the grantor, her husband and children successively bars their right of entry. The deed being void, the right of entry accrued at once to the grantor, and cumulative disabilities not being allowed, the right of action of the children was barred.—*Updegrove v. Blum*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 765.

90. LUNATIC — Tort — Contributory Negligence—Practice.——The estate of a lunatic is liable in damages for his tortious acts. If the question of the contributory negligence of the person killed by a lunatic is not presented properly to the trial court it cannot be considered by the supreme court.—*McIntire v. Sholty*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 239.

91. MALICIOUS PROSECUTION—Advice of Counsel.—— An action for malicious prosecution will not lie where the defendant fully and correctly stated the facts to his counsel and acted under his advice.—*Mesher v. Iddings*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 328.

92. MALICIOUS PROSECUTION—Probable Cause.——An instruction in a suit for damages for malicious prosecution, that if the defendant honestly thought the plaintiff to be guilty, and his belief was based on knowledge of facts and circumstances tending to show guilt, which were sufficient to induce an ordinarily reasonable and cautious man to believe plaintiff guilty, the jury should find probable cause, correctly states the law.—*Donnelly v. Burkett*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 330.

93. MASTER AND SERVANT—Fellow-servant.——A railroad company is not liable to a car repairer for injuries caused by the negligence of the foreman of the car repairers and the engineer of the switch engine, where there is no evidence that the two latter were incompetent.—*Peterson v. Chicago, etc. R. Co.*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 260.

94. MASTER AND SERVANT—Negligence — Evidence.—— Circumstances stated in which a servant is not entitled to recover damages, although very grievously injured.

for want of sufficient evidence to show how the disaster occurred, and to fix the responsibility on the master.—*Cahill v. Hilton*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 239.

95. MINES—Patents — Tunnels. —— An owner in fee simple, under grant by a town-site patent, issued in 1869, owns all his ground, except a gold-bearing quartz ledge known to exist thereon at the date of the town-site patent, and no one has a right without his consent to tunnel under his ground to reach such a quartz ledge.—*Dower v. Richards*, S. C. Cal., Sept. 28, 1887; 15 Pac. Rep. 105.

96. MORTGAGE—Chattel—Dating Back—Renewal.—— A chattel mortgage, properly filed, is not affected by being antedated, nor because given in renewal of other mortgages which were not recorded.—*Johnson v. Stellwagen*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 252.

97. MORTGAGE—Foreclosure—Defense at Law.——A claim that a mortgagor has a defense against a mortgagee for damages for cutting timber on the land, and that the mortgagee is insolvent, is a defense at law, and is no ground for a suit in equity to restrain the trustee from selling for non-payment of the debt.—*Cleaver v. Matthews*, S. C. App. Va., September Term, 1887; 3 S. E. Rep. 439.

98. MUNICIPAL CORPORATIONS—Contracts—Authority. —— A municipal corporation may make a contract for current supplies through its appropriate officers or committee; if it is not probably authorized it may be ratified by the enjoyment of its fruits without objection. In a contract to light the streets, after verdict for plaintiff, it must be held that the contract did not show intent to create a debt; the debt came from a breach of the contract.—*City of Conyers v. Kirk*, S. C. Ga., April 15, 1887; 3 S. E. Rep. 442.

99. MUNICIPAL CORPORATIONS—Dedication.—— Construction of a deed and parol agreement of the original founder of Harrisburg, Pennsylvania, dedicating land to public uses as streets. Ruling as to markets and nuisances.—*City of Harrisburg's Appeal*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 787.

100. MUNICIPAL CORPORATIONS — Fire Department — Statutes.——Construction of New York statutes relating to the fire department of New York city, its powers and duties, and its relations to the other departments of the city government.—*City of New York v. Atlas, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 329.

101. MUNICIPAL CORPORATIONS — Gas-lighting — Statutes.——Construction of the charter of the city of Lambertville, New Jersey, and its contracts for gas-lighting under it.—*Taylor v. City of Lambertville*, N. J. Ct. Ch., Oct. 22, 1887; 10 Atl. Rep. 809.

103. MUNICIPAL CORPORATIONS—Negligence. —— It is not necessarily negligence in a municipal corporation to permit bricks in its sidewalks to become loose and misplaced in spots if the defect is not dangerous to persons using ordinary care.—*Town of Gosport v. Evans*, S. C. Ind., Oct. 13, 1887; 13 N. E. Rep. 256.

104. MUNICIPAL CORPORATIONS—Streets—Location.—— The charter of Milwaukee, giving the common council power to vacate streets and alleys, the circuit court has no jurisdiction in such case.—*Brandt v. Milwaukee*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep 246.

105. MUNICIPAL CORPORATIONS—Sewers—Statute—Appeal—Record.——Construction of Illinois city and village act with reference to sewers and proceeding relative thereto. Rulings on appeals, records and amendment.—*Ogden v. Town of Lake View*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 159.

106. NEGLIGENCE—Trespasser—Pleading — Variance.—One who walks upon a railroad track in a street is not a trespasser, and if injured by a train upon such track can recover damages, if his injury was caused by negligence in the running of the train or the construction of the track, or both. Ruling upon pleading and variance.—*Louisville, etc. Co. v. Phillips*, S. C. Ind., Oct. 12, 1887; 13 N. E. Rep. 132.

107. NUISANCE—Affidavit—Criminal Practice — Venue. ——An information upon affidavit for maintaining a public nuisance need not describe the location of the nuisance. Rulings on statutes regulating criminal practice and change of venue in Indiana.——*Dronberger v. State*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 259.

108. NUISANCE—Injunction.——After the petition for an injunction against a nuisance was filed, the nuisance was abated in part: *Held*, that the injunction should be confined to the nuisance not abated.—*Trilock v. Mente*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 307.

109. OFFICES — Usurpation — Superior Court.——The superior court has jurisdiction of an action against a party for usurping a public office and can incidentally determine whether the office exists.—*Ex parte Henshaw*, S. C. Cal., Sept. 28, 1887; 15 Pac. Rep. 110.

110. PARTITION—Orders in Chambers. ——The judge of a court of common pleas can grant an order of sale in partition at chambers without the consent of the parties in interest.—*Woodward v. Elliott*, S. C. S. Car., Oct. 10, 1887; 3 S. E. Rep. 477.

111. PARTITION—Tenancy in Common. —— Where a party buys on execution a cellar, except that portion used by the defendant for the storage of provisions and vegetables, he cannot maintain an action for partition.—*Johnson v. Moser*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 314.

112. PARTNERSHIP — Dissolution — Trusts.——Where, by agreement, three parties purchase land, one paying the money and the deed being made to him, the land to be sold and after paying the price, costs, etc., the residue to be divided among the three, the partner holding the title is a trustee, and can be required to convey to the respective parties their interests after his money, the costs, etc., have been refunded to him by the sale of a part of the land.—*Tenney v. Simpson*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 187.

113. PARTNERSHIP — Estoppel — Accounting. ——Circumstances stated in which a surviving partner who had represented to the widow of his deceased partner that her share of the partnership assets would be $7,000, is estopped to deny the solvency of the partnership. Ruling upon accounting.—*Joplin v. Cordrey*, Ky. Ct. App., Oct. 11, 1887; 5 S. W. Rep. 397.

114. PATENTS — Anticipation. —— Woodruff's patent for buckles (reissued), No. 8,541, is *held* to be anticipated by the Cole patent, No. 69,181.—*Woodruff v. Carr*, U. S. C. C. (Minn.), Oct. 3, 1887; 32 Fed. Rep. 224.

115. PATENTS—Bell Telephone—Anticipation.——The patent to A. G. Bell for telephones, No. 174,465, is not anticipated by the invention of Reis, of Germany, nor by that of Holcomb, and is valid against both of them.—*American, etc. Co. v. Molecular, etc. Co.*, U. S. C. C. (N. Y.), June 24, 1885; 32 Fed. Rep. 214.

116. PATENTS—Infringements—Injunction. —— Statement of facts which show that plaintiff's patent for dress shield will not warrant a preliminary injunction against alleged infringement by defendant.—*Canfield, etc. Co. v. Gross*, U. S. C. C. (Mass.), Sept. 12, 1887; 32 Fed. Rep. 226.

117. PATENTS—Machine.——One who has a patent for a machine by which certain articles may be produced, cannot take out a patent for that class of articles so as to extend his right beyond the expiration of the first patent.—*Excelsior, etc. Co. v. Union, etc. Co.*, U. S. C. C. (N. Y.), Feb. 23, 1885; 32 Fed. Rep. 221.

118. PLEADING—Answer—Reply — Waiver.——Where an amended answer is put in, containing new matter, and the parties go to trial thereon, without objection, the necessity for a new reply, if such exist, is waived.—*Cooper v. Davis S. M. Co.*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 235.

119. PLEADING—Deceit—Allegation.——An allegation that plaintiff sold certain goods to a vendee upon defendant's written statement as to the means and credit of the vendee in reply to the plaintiff's letter, which statements were false and fraudulent, and were made

to deceive the plaintiff and did deceive him and induce him to give the desired credit, states the essential elements of an action of deceit.—*Thomas v. Wright*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 487.

120. PLEADING — Demurrer — Evidential Facts.——Where the complaint states a cause of action, a demurrer to certain essential facts stated therein, which does not apply to the necessary allegations, cannot be sustained.—*Hancock v. Hubbs*, S. C. N. Car., Oct. 18, 1887; 3 S. E. Rep. 489.

121. PLEADING—Demurrer— Misjoinder.——Though a joint demurrer may be good as to one, it must fail, unless it is good as to all who join in it. A demurrer for defect of parties is only proper when necessary parties have been omitted.—*Lowry v. Jackson*, S. C. S. Car., Oct. 6, 1887; 3 S. E. Rep. 473.

122. PLEADING—Elections—Allegations.——In an action to contest the result of an election as declared by the board of county canvassers, it is sufficient to allege that the board erred in rejecting the returns from certain voting places mentioned.—*Kilburne v. Patterson*, S. C. N. Car., Oct. 18, 1887; 3 S. E. Rep. 491.

123. PLEADING—Elections —Allegations.—— An allegation in the petition in a contest of an election that the plaintiff received a majority of the votes cast is sufficient, without stating that they were legal votes.—*State v. Stinson*, S. C. N. Car., Oct. 18, 1887; 3 S. E. Rep. 490.

124. PLEADING—Fraud— Multifariousness.—— A suit against a former administrator and others, after final settlement, for procuring fraudulent judgments and orders to be entered in the probate court, whereby the estate was defrauded, of which facts the plaintiff only learned after the settlement, states only one cause of action, and the district court has jurisdiction.—*Gafford v. Dickinson*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 175.

125. PLEADING—General Denial—Issues.——A sworn denial "of each and every allegation, averment and statement contained" in the petition, puts in issue every allegation, including those requiring a denial on oath.—*Hayner v. Eberhardt*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 168.

126. PLEADING—Separate Causes of Action.——Where a pleading states that defendant is indebted to plaintiff to balance due as per settlement, and also on an open itemized account, it states two causes of action.—*Eisenhouer v. Stein*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 167.

127. PLEADING—Several Defenses—General Demurrer. A general demurrer to an answer will be overruled when one of the defenses is good.—*Flint v. Dulany*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 208.

128. PLEDGE — Discharge. —— Where one gets the money due him on a pledge ignorantly, if he is not hurt by his ignorance the effect is the same as though he acted with knowledge.—*Coleman v. Jenkins*, S. C. Ga., April 18, 1887; 3 S. E. Rep. 444.

129. PRACTICE—Bill of Exceptions.——A bill of exceptions consisting of a transcript of the reporter's notes of the evidence and proceedings is defective.—*January v. Superior Court*, S. C. Cal., Sept. 30, 1887; 15 Pac. Rep. 108.

130. PRACTICE—Bill of Exceptions—Signing.——Where the court reporter cannot prepare the bill of exceptions within the time allowed, it should be signed afterwards and made a part of the record.—*Richards v. State*, S. C. Neb., Oct. 6, 1887; 34 N. W. Rep. 346.

131. PRACTICE—Counterclaim— Different Rights.—— In a suit for using and injuring a wagon, formerly belonging to plaintiff's husband, defendant cannot be allowed as a counterclaim a demand against the husband on the ground that he did not know that the husband had sold the wagon to the plaintiff, when he does not show that he acted on the belief that the husband was the owner.—*Sloteman v. Thomas, etc. Co.*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 225.

132. PRACTICE—Judgment by Default—Setting Aside.—Where defendant, after the time allowed, but before default is taken, applies for time to answer, and is informed by the court that the case will not be reached that term and that he will have time to answer, but judgment is rendered against him in a few days thereafter and execution issued, he is entitled to have the judgment set aside and to be allowed to answer upon a proper showing and just terms.—*Sanders v. Hall*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 197.

133. PRACTICE—Jury—Challenges—Panel.——Though the defendant uses his last peremptory challenge in case where the juror was improperly declared to be competent, there is no error, if it does not appear that the jury on the trial was partial or objectionable. An objection that the lists of jurors were not certified from the towns to the county commission, comes too late on a motion for a new trial.—*Hencke v. Milwaukee, etc. R. Co.*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 243.

134. PRACTICE—New Trial—Appeal.——A trial court has large discretion in the matter of new trials, and a clearer abuse of judicial discretion must be shown where a new trial was granted, than where it was refused, to warrant a reversal on appeal. — *Murphy v. Hindman*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 182.

135. PRACTICE—Set-off—Equitable. —— In an action for services an equitable set-off of a judgment, assigned to the defendant, against the plaintiff and other members of an insolvent firm may be allowed.—*Seligman v. Heller, etc. Co.*, S. C. Wis. Oct. 11, 1887; 34 N. W. Rep. 232.

136. PRACTICE—Stipulation—Pleadings.——A stipulation giving time to serve and file an answer gives the right to demur.—*Steele v. Moss*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 237.

137. PRACTICE — Trial — Amendment. —— A second amended complaint, which is substantially the same as the original, may be filed after the commencement of the trial upon the terms imposed by the court.—*Riverside, etc. Co. v. Jensen*, S. C. Cal., Oct. 7, 1887; 15 Pac. Rep. 131.

138. PRINCIPAL AND AGENT—Commissions.——A sewing machine company, having through its manager employed an agent and agreed to pay him commissions on sales made by him, cannot, after accepting his services, resist his claim for commissions on the ground that the manager had exceeded his authority.—*American, etc. Co. v. Mower*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 762.

139. PUBLIC LANDS—Grant—Collateral Attack.——A grant of land by the State, regular on its face, cannot be attacked in an action between private individuals because the surveyor-general failed to properly lay off the land prior to the grant.—*Frampton v. Wheat*, S. C. S. Car., Oct. 6, 1887; 3 S. E. Rep. 462.

140. PUBLIC LANDS—Railroad Grant — Title. —— The title to lands granted to a railroad under an act of congress does not pass when the land is first surveyed, but when the plat of the road is filed in the proper office.—*Sioux City, etc. Co. v. Griffey*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 304.

141. PUBLIC LANDS—Homestead—Trust.——One who has paid for lands to the land office of the United States is entitled to the land, and is not liable to the government for timber previously cut off the land by him. Where one is entitled to a patent for a homestead, the government holds the legal title as trustee for him until the patent is issued.—*United States v. Freyberg*, U. S. C. C. (Wis.), December, 1886; 32 Fed. Rep. 195.

142. RAILROADS — Crossings — Constitutional Law — Statutes. ——Construction of Indiana statutes regulating farm crossings of railroad tracks. Rulings on the constitutionality of those statutes.—*Hunt v. Lake Shore, etc. Co.*, S. C. Ind., Oct. 11, 1887; 13 N. E. Rep. 263.

143. RAILROADS—Statute—Construction. —— Construction of Pennsylvania statute of April 9, 1856, supplementary to "the railroad law of 1849," and subsequent statutes relating to railroads.—*Gettysburg, etc. Assn. v. Sherfy*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 758.

144. RAILROADS — Eminent Domain — Removal of Causes—Statutes.——The Illinois Rev. Stat., ch. 114, §

17, does not authorize a new railroad company to condemn under eminent domain law the right of way of another railroad company for the purpose of building thereon another parallel line. Circumstances stated under which a cause is not removable to a federal court.—*Illinois, etc. Co. v. Chicago*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 140.

145. RAILROADS—Fences—Statute.——Under the statute of Illinois, railroad companies are required to fence both sides of their tracks, and it is *held* that fences ten feet within a railroad's right of way constitute a sufficient compliance with the statute, although strictly the fences should inclose the whole right of way.—*Ohio, etc. Co. v. People*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 236.

146. RAILROADS—Indemnity Bonds—Municipal Aid.—When a municipality issues bonds to a railroad company upon conditions, and the railroad gives a bond of indemnity, secured by a deed of trust for the performance thereof, a *bona fide* purchaser of a bond from the company may be substituted as to the right of the municipality as to the security, when his coupons are not paid at maturity.—*Washington, etc. Co. v. Casenove*, S. C. App. Va., September Term, 1887; 3 S. E. Rep. 433.

147. RAILROADS—Killing Stock.——A railroad company is not responsible in damages for killing stock which the owner willingly permits to go upon the right of way.—*Fort Wayne, etc. Co. v. Woodward*, S. C. Ind., Oct. 12, 1887; 13 N. E. Rep. 260.

148. RAILROADS—Killing Stock—Statute.——Circumstated under which a railroad company is not liable in damages for killing stock at a private crossing. Construction of Indiana statutes on this subject.—*Pennsylvania Co. v. Spaulding*, S. C. Ind., Oct. 12, 1887; 13 N. E. Rep. 268.

149. RAILROADS—Mortgage—Stockholders.——Where railroads had made a consolidation and mortgaged all their property, and the mortgage was about to be foreclosed, it was held that a bill to enjoin the foreclosure, filed by the stockholders, could not be sustained, although one of the companies had no legal existence. Such proceedings should be by the State.—*Bell v. Pennsylvania, etc. Co.*, N. J. Ct. Ch., Oct. 1, 1887; 10 Atl. Rep. 742.

150. RAILROADS—Mortgage—Trustee—Compensation—Statute.——Under United States Revised Statutes, a trustee is only entitled to one per cent. commissions for receiving and paying out amounts exceeding $10,000. Rule applied to railroad trustees.—*Dow v. Memphis, etc. Co.*, U. S. C. C. (N. Y.), Jan. 19, 1887; 32 Fed. Rep. 185.

151. RECEIVER—Lease.——A receiver may be authorized to lease real property for a term certain, which may outlast the litigation. The court may modify the order or lease, but will make a proper indemnity to the lessees a condition of doing so.—*Weeks v. Conwell*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 96.

152. RECEIVER—Certificates—Mortgage. —— Circumstances stated under which the certificates of a receiver, issued by order of court without notice to or consent of the holders of bonds, secured by a mortgage, were held not to be entitled to priority of payment over the mortgage.—*Raht v. Attrell*, N. Y. Ct. App., October, 1887; 13 N. E. Rep. 282.

153. RECEIVER— Judicial Discretion. —— The allowance of compensation to receivers for their services is a matter of sound judicial discretion. Circumstances stated under which trustees were allowed for their services $70,000 each.—*Central, etc. Co. v. New York, etc. Co.*, U. S. C. C. (Mo.), Sept. 19, 1887; 32 Fed. Rep. 187.

154. RECORDING—Defective Certificate—Notice.——A mortgage, properly executed and acknowledged, though the certificate of acknowledgment is defective, is valid against a subsequent purchaser with knowledge of it as recorded, when he has parted with no value and has only acquired a contingent liability which has never become fixed.—*Hutchinson v. Ainsworth*, S. C. Cal., Sept. 27, 1887; 15 Pac. Rep. 82.

155. RECORDING—Mortgages—Priority.—— A recorded mortgage for a pre-existing debt has precedence over an unrecorded mortgage given to secure the payment of machinery furnished to construct a mill, of which mortgage the mortgagee in the recorded mortgage had no notice.—*Hayner v. Eberhardt*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 168.

156. RECORDS—Decree—Books to be Kept.——The requirement of a record book, in Iowa, is directory, and a decree of mortgage foreclosure is not void because entered in another book.—*Carr v. Bosworth*, S. C. Iowa, Oct. 11, 1887; 34 N. W. Rep. 317.

157. REHEARING.——The circuit court will not grant a rehearing upon certain newly-discovered evidence, so as to reopen a question that has already been decided by a justice of the Supreme Court of the United States.—*Reed v. Lawrence*, U. S. C. C. (Mich.), Sept. 10, 1887; 32 Fed. Rep. 228.

158. REMOVAL OF CAUSES.——Under the act of March 3, 1887, the circuit court cannot take cognizance of a suit brought against a party who is not a resident of the district in which he is sued. And under the same act a cause cannot be removed from a State court to a federal court which could not have been originally brought in the latter court.—*County of Yuba v. Pioneer, etc. Co.*, U. S. C. C. (Cal.), Aug. 29, 1887; 32 Fed. Rep. 183.

159. REPLEVIN—Demand — Pledge.——Where, in replevin, the defendant claims as owner, with the right of possession, and a demand would have been unavailing, proof of demand and refusal is not required. An actual delivery is essential to a pledge.—*Raper v. Harrison*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 219.

160. RES ADJUDICATA — Habeas Corpus — Custody of Child.——A decision in a *habeas corpus* case to determine the right to the custody of a child is *res adjudicata* in all future controversies between the same parties on the same matter and upon the same state of facts.—*State v. Bechdel*, S. C. Minn., Oct. 12, 1887; 34 N. W. Rep. 334.

161. RIPARIAN RIGHTS—Navigable Stream—Railroad.—Owners of land on a river, declared by act of congress to be navigable, do not on the repeal of the act acquire title to the bed of the river. A railroad which has constructed its track upon land below the high-water mark in such navigable stream, acquires a title against the adjoining riparian owners to the land it occupies, and accretions beyond that line do not accrue to such owners.—*Chicago, etc. Co. v. Porter*, S. C. Iowa, Oct. 6, 1887; 34 N. W. Rep. 286.

162. RIPARIAN RIGHTS—Mills—Overflow—Nuisance.—In proceedings to utilize a water-power, one whose land lies four inches distant direct and six miles by the stream from the proposed dam, and three-quarters of a mile from the stream, need not be made a party, and such party cannot, fifteen years after the issue of the license, proceed in equity to abate the dam and recover damages for overflow and seeping.—*Wilson v. Hanthorn*, S. C. Iowa, Oct. 7, 1887; 34 N. W. Rep. 203.

163. SALE—Warranty—Tender. —— A disease of the kidneys and spine, whose symptoms are not visible, and which is unknown to the buyer, is covered by a warranty of soundness in the sale of a horse, and the purchaser may sue on the warranty without returning the horse.—*Storrs v. Emerson*, S. C. Iowa, Oct. 5, 1887; 34 N. W. Rep. 176.

164. SALE—Sample—Warranty.—— Where goods are sold without samples, but are warranted as to quality, but upon using some of them they are found not to be as represented, and the rest upon inspection are found not to be different, the vendee can hold the goods for the seller, and is not liable for the price.—*Cooper v. Hall*, S. C. Neb., Oct. 6, 1887; 34 N. W. Rep. 349.

165. SALE—Warranty—Waiver.——Where on a sale of a harvester it is warranted to do as good work as others, evidence showing a comparison with others is admissible. Giving notes in payment therefor after a trial of the machine is not a waiver of the defects, when the seller agreed to repair it and make it satisfy the warranty.—*Osborne v. Carpenter*, S. S. Minn., July 29, 1887; 34 N. W. Rep. 163.

166. SCHOOLS — Removal—Mandamus.——Where the petition, for the removal of the school-house alone is granted by the State superintendent on appeal from the district directors, *mandamus* will lie to compel the directors to make the removal.—*Newby v. Free*, S. C. Iowa, Oct. 5, 1887; 34 N. W. Rep. 168.

167. SCHOOLS—Waste—Remedy.——A tax payer cannot in his own name sue the board of directors of a school district for illegally spending money for a school site without first asking the proper officer to sue. The remedy for an illegal or injudicious location of a school house is by appeal to the county superintendent.—*Independent S. D. v. Gookin*, S. C. Iowa, Oct. 5, 1887; 34 N. W. Rep. 174.

168. SEAMEN'S WAGES—Lien.——The seamen, crew of a wrecked vessel, have a lien for wages upon articles saved by the captain from the vessel, the same as they had on the vessel itself.—*Hart v. Proceeds, etc.*, U. S. D. C. (Ohio), April Term, 1887; 32 Fed. Rep. 234.

169. SEDUCTION—Minor Daughter—Damages.——The relation of master and servant between father and daughter, in a case of seduction, is presumed, if she is under age and under his control, and damages may include all he has felt and suffered in connection with the wrong.—*Barbour v. Stephenson*, U. S. C. C. (Ky.), 1887; 32 Fed. Rep. 66.

170. SHERIFF — Parties — Indemnity. —— Under the statute of Texas a sheriff is entitled, when sued for an alleged unlawful seizure, to have the party at whose instance such seizure was made and his surety in the indemnifying bond given to the sheriff, made parties to the suit against him, and to a continuance, as of right, in order that process may be served on such new defendents: *Held*, that when an order has been made that the persons indicated shall be made parties, it will be presumed that such facts were shown as entitled the sheriff to a continuance.—*Rains v. Herring*, S. C. Tex., June 14, 1887; 5 S. W. Rep. 369.

171. SHIPS—Forfeiture —Informers.——Neither naval officers nor consular agents, who convey information leading to the seizure of a vessel, are informers, when the only information they give was received in the regular discharge of their duty. In this case the crew were the informers.—*The City of Mexico*, U. S. D. C. (Fla.), June 14, 1887; 32 Fed. Rep. 105.

172. SPECIFIC PERFORMANCE—Statute of Limitations—Statutes.——To an action for specific performance, brought by a vendee against his vendor on a title bond, a plea of the statute of limitations is bad, as under the statute of Kentucky (Gen. Stat. Ky. ch. 71, art. 4, § 20,) the obligation of the vendor in such a case is an express trust.—*Hamilton v. Bailey*, Ky. Ct. App., Oct. 4, 1887; 5 S. W. Rep. 383.

173. STATE TREASURER —Official Bond—Statutes.—— Under the statutes of Pennsylvania, it is no defense to an action on the official bond of the State treasurer that public money was lost by the insolvency of the bank in which he deposited it. — *Baily v. Commonwealth*, S. C. Penn., Oct. 3, 1887; 10 Alt. Rep. 764.

174. STATUTES — Adoption — Salary.——Two statutes passed and to take effect the same day on the same subject will be construed as one act. The probate judge of Yarapai county receives a salary of $2,000 from the salary fund and $600 from the school fund.—*Territory v. Wingfield*, S. C. Ariz., Oct. 18, 1887; 15 Pac. Rep. 139.

175. STATUTE OF FRAUDS — Pleading. —— A petition based on a contract that should be in writing under the statute of frauds is demurrable if it does not set out the writing and signature, but the defect is cured if the defendant fails to demur and instead answers denying the contract.—*Smith v. Theobald*, Ky. Ct. App., Oct. 11, 1887; 5 S. W. Rep. 394.

176. STATUTES — Retrospective—City Property — State Agents.——A statute passed after the occurrence limiting the recovery for negligence must be held to be prospective. A city is liable for its sidewalks though the property is in charge of police commissioners appointed by the governor.—*Osborne v. City of Detroit*, U. S. C. C. (Mich.), Oct. 25, 1887; 32 Fed. Rep. 36.

177. STATUTES—Title—Legislative Journals.——Chapter 70, Laws 1883, is not unconstitutional or void on account of discrepancies or irregularities in the description of the title of the bill in the legislative journals.—*Ayers v. Commrs. of Trego Co.*, Oct. 8, 1887; 15 Pac. Rep. 229.

178. STREETS — Obstructions — Telephone Poles.—— The erection and maintenance of telephone poles and wires in streets infringes the rights of the adjoining property owners, who own the fee of the streets, though the public authorities have authorized such use of the streets.—*Willis v. Erie, etc. Co.*, S. C. Minn., Oct. 7, 1887; 34 N. W. Rep. 337.

179. SURETIES—Limits of Liability—Statutes.——The liability of a surety on a bond cannot exceed its penalty. This rule applies to sureties on appeal from the judgment of a justice of the peace for possession of real estate. Construction of Indiana statutes bearing on the subject.—*Graeter v. De Wolf*, S. C. Ind., Sept. 29, 1887; 3 N. E. Rep. 111.

180. TAXATION—Action on Tax-deed—Limitation.—— An action by a tax-title holder against one in possession for more than two years, claiming under a later tax-sale, must be brought within two years after plaintiff's deed is recorded, or, which in law is the same, filed for record with the recorder of deeds.—*Smith v. Jones*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 185.

181. TAXATION — Agreement to Sell Land. —— An agreement to sell land upon conditions precedent, where time is of the essence of the contract, and no notes are given for the purchase money, and neither legal nor equitable title is conveyed thereby, is not taxable.—*Branner v. Thomas*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 211.

182. TAXATION — Assessment — Overvaluation — Statutes.——Construction of Illinois statutes relative to taxation, assessments for taxes, overvaluations in such assessments, and remedies for such overvaluation.—*Phœnix, etc. Co. v. Gleason*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 209.

183. TAXATION — Cancelling Tax-deed — Equity.—— Where a party files a bill to set aside a tax-deed as a cloud on his title, he will be required to pay the taxes justly due.—*Dillon v. Merriam*, S. C. Neb., Oct. 5, 1887; 34 N. W. Rep. 344.

184. TAXATION — Foreign Insurance Companies.—— Construction of Ohio statutes relating to the taxation of insurance companies organized in other States and the mode of ascertaining the amount on which such tax is to be assessed.—*State ex rel. v. Remmond, Supt.*, S. C. Ohio, June 7, 1887; 13 N. W. Rep. 30.

185. TAXATION—Jail—Constitution.——The act of 1886, authorizing Shawnee county to levy an assessment to build a jail and a jailer's residence, is constitutional and valid.—*Washburn v. Shawnee Co.*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 237.

186. TAXATION — Overvaluation — Equalization—Statutes.——Construction of the Illinois statutes relative to the overvaluation of property by assessors for purposes of valuation, the mode of seeking redress and the functions of boards of equalization.—*New York, etc. Co. v. Gleason*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 204.

187. TAXATION—Redemption—Parties to Suit.——The assignee of a mortgage claiming under a tax-sale, whose assignment is not recorded, is not a necessary party to a suit to redeem the land from that tax-sale, and cannot, in an action by him to foreclose, attack as fraudulent such decree of redemption.—*Van Gorder v. Hanna*, S. C. Iowa, Oct. 13, 1887; 34 N. W. Rep. 332.

188. TAXATION — Sale —Foreclosure—Deed.——Under Wisconsin law, the holder of a tax-certificate may foreclose the same by action after three years, but prior to three months before the expiration of six years.—*Goff v. Bond*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 236.

189. TAXATION—Setting Aside Tax-deed—Statutes.——

Under Kansas laws, when one party has put on record several tax-deeds upon the same sale, the owner has two years after the last record thereof to sue to set aside any or all of them.—*Austin v. Jones*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 166.

190. TAXATION—Statute.—— Construction of Pennsylvania statutes relative to taxation, State and county, revenue commissioners and other matters relating to the finances of the State.—*Commonwealth v. Philadelphia Co.*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 772.

191. TAXATION —Statute—Repeal.——Construction of Pennsylvania statute, June 30, 1885, repealing all laws taxing certain corporations and reserving taxes already accrued.—*MacKellar, etc. Co. v. Commonwealth*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 780.

192. TAXATION—Tax-deed.——Where H paid half the taxes on a 160-acre tract of land, and the tract was sold for taxes, the tax-deed conveying the whole tract except eighty acres on which H had paid taxes, the deed was held insufficient as not designating properly which part of the land was sold.—*Henderson v. White*, S. C. Tex., Oct. 11, 1887; 5 S. W. Rep. 374.

193. TAXATION —Tax-deed—Injunction.——In an action to enjoin the issuance of tax-deeds upon tax-certificates issued upon a sale of land which was illegal, it was held that the injunction would only be granted upon repayment to the holder of the certificates of the money that he had paid at the tax-sale.—*Alexander v. Merrick*, S. C. Ill., Sept. 25, 1887; 13 N. E. Rep. 190.

194. TAXATION —Tax-deed—Tender.——Where a bill to set aside a tax-deed was filed, and it was alleged that a tender had been made to defendant's agent of the amount due to defendant, the bill making no such tender and no money being deposited in court, the tender is *held* insufficient.—*Gage v. Arndt*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 138.

195. TAXATION — Tax-payer — Equalization. —— One who has property assessed for taxes may contest the equity of such assessment before the board of equalization, but he cannot maintain a bill in equity to enjoin the collection of taxes so assessed until he has applied for redress to the county authorities.—*Dundee, etc. Co. v. Charlton*, U. S. C. C. (Oreg.), Oct. 10, 1887; 32 Fed. Rep. 192.

196. TAX-SALE — Redemption—Expiration.——Where the affidavit of notice given to the owner of the expiration of the time for redemption of land from a tax-sale lacks the notary's seal to the jurist, such defect may be cured, and the right of action is barred in five years after the deed is made, but not so when such notice is not given.—*Slyfield v. Healy*, U. S. C. C. (Iowa), January Term, 1886; 32 Fed. Rep. 2.

197. TENANTS IN COMMON—Accounts—Partition.——In a matter of account between tenants in common and where partition can only be made by sale of the premises, equity has jurisdiction.—*Lowe v. Burke*, S. C. Ga., March 23, 1887; 3 S. E. Rep. 449.

198. TRADE-MARK—Geographical Name—Stamped Bottles.——Where both parties import lime-juice from an island, one cannot claim a trade-mark of the name of the island, nor can defendant sell lime-juice in bottles stamped with complainant's name.—*Evans v. Von Laer*, U. S. C. C. (Mass.), Sept. 8, 1887; 32 Fed. Rep. 153.

199. TRADE-MARK — Infringement —Corporation.—— Circumstances stated which constitute an infringement of a trade-mark to the use of which the plaintiff was exclusively entitled. Circumstances stated in which non-residents of a State may form a corporation in such State and carry on business therein under its laws although the articles it sells are manufactured in another State.—*Morie, etc. Co. v. Baumbach*, U. S. C. C. (Tex.), July 11, 1887; 32 Fed. Rep. 205.

200. TRADE-MARKS—New Word—Use.——A corporation using the word celluloid as a trade-mark can restrain another corporation from using the word cellonite as a trade-mark, and though the word subsequently is commonly used to designate the product, yet the original party can alone use it as a trade-mark.—*Celluloid M. Co. v. Collomite M. Co.*, U. S. C. C. (N. J.), July 12, 1887; 32 Fed. Rep. 94.

201. TROVER — Defenses —Evidence.——To maintain trover it must appear that the right of possession was in the plaintiff at the time of the conversion, and no defense is valid which does not controvert that right. Evidence of the declarations of an agent are properly excluded when not limited to such time and place as make them part of the *res gestæ*.—*Montgomery v. Brush*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 230.

202. TRUSTS — Resulting Trusts — Evidence. —— Circumstances stated under which a resulting trust in land, paid for with the money of plaintiff, is established, although the title was in the defendant and forty years had elapsed. Rulings on the subjects of equity jurisdiction, laches, public lands and bankruptcy.—*Bush v. Stanley*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 249.

203. USURY—Commissions—Agency—Knowledge.—— Where A borrows money from B through C, who acts as agent for the firm of D and Co., and one-fifth of the money goes to C and to D and Co. as commissions, the contract is tainted with usury, and B is chargeable with knowledge when such loans were continually made.—*Sherwood v. Roundtree*, U. S. C. C. (Ga.), August, 1887; 32 Fed. Rep. 113.

204. USURY—Limitation.——Where A, in payment of his debt to B, gives negotiable notes of C, which A indorses without recourse and which B receives at their face value, and some money is paid, whereby B receives $3,400 for a debt of $2,700, under North Carolina law, the transaction is usurious. An action for usury is barred in two years after the usurious interest is paid, not after the contract is made.—*Pritchard v. Meekins*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 484.

205. USURY—Loan—Agent. —— If an agent of the lender reserves his commissions out of the money to be paid to the borrower, such reservation does not render the contract usurious as to the lender, he not being privy to such additional charge.—*Williams v. Bryan*, S. C. Tex., Oct. 11, 1887; 5 S. W. Rep. 401.

206, WILL—Ambiguity—Parol Evidence.——Where a part of the description of the land devised does not apply to any land owned by the devisor, such part may be rejected, and the rest may be applied to land of his which it describes. In Georgia, parol evidence is admissible to explain latent and patent ambiguities in wills.—*Rogers v. Rogers*, S. C. Ga., April 7, 1887; 3 S. E. Rep. 451.

207. WILL — Annulling Probate — Judgment. —— A judgment annulling the probate of a will, which also adjudges that contestant take the same share as if defendant had died intestate, is void, and should be corrected.—*In re Freud*, S. C. Cal., Oct. 7, 1887; 15 Pac. Rep. 135.

208. WILL—Bequest—Contingent Interest.——A testator directed a certain sum of money to be paid to his daughter, and to each of her children as they became of age or married, a certain other sum or share. One of the children died in infancy: *Held*, that each share was contingent upon its coming of age, and in case of death vested in the mother and surviving brothers and sisters. —*Chamberlain v. Young*, Ky. Ct. App., June 11, 1887; 5 S. W. Rep. 380.

209. WILL—Construction— Executor. —— Where the construction of a will is doubtful, a court of equity will give proper directions for the execution thereof to the executor upon his application, but it will not charge a trust estate with the cost of such an application when there is no doubt.—*Baxter v. Baxter*, N. J. Ct. Ch., Oct. 18, 1887; 10 Atl. Rep. 814.

210. WILLS—Construction—Superior Court.——If the superior court has jurisdiction to construe a will, it may decline to do so, when no special reason for the intervention of equity is shown.—*Siddall v. Harrison*, S. C Cal., Oct. 7, 1887; 15 Pac. Rep. 130.

211. WILLS — Contest.——Where the evidence shows that the deceased was usually of sound mind, though his mind had been disturbed, but not when the will was made, though the contestants were his relatives, whom he had a motive for disinheriting, and his devisees were not relatives, the decision of the court sustaining the will should not be reversed.—*Smith v. James*, S. C. Iowa, Oct. 10, 1887; 34 N. W. Rep. 309.

212. WILL — Contract — Construction. —— A writing may be in part a contract and in part testamentary in relation to other property. If it vests a present interest, though the right of possession be postponed, it is a contract; if the interest only accrues upon the death of the owner, the paper is testamentary.—*Reed v. Hazleton*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 177.

213. WILLS—Limitation. —— Construction of Illinois statute prescribing the mode of contesting the validity of a will and limiting the period within which such contests shall be made.—*Luther v. Luther*, S. C. Ill., Sept. 26, 1887; 13 N. E. Rep. 166.

214. WILLS — Nuncupative—Probate.—— A notice by publication of the presentation of a nuncupative will for probate gives the circuit court jurisdiction, and its order for the probate can only be attacked by original or appellate proceedings.—*In re Middleton*, S. C. Iowa, Oct. 6, 1887; 34 N. W. Rep. 193.

215. WILLS — Probate —Contest.—— The proponent of a will proceeds to establish it when the contestant, though his allegations have not been denied, proceeds to establish his grounds of contest, when, if he has failed, the will is admitted to probate.—*In re Doyle*, S. C. Cal., Oct. 7, 1887; 15 Pac. Rep. 125.

216. WILLS—Realty—Specific Legacies.——Where by will a testator makes specific legacies and then a devise to his wife and then gives the rest and residue to other parties, and by codicil gives another legacy, the real estate, except that devised to the widow, is chargeable in case the personalty is not sufficient to pay the legacies.—*Jandon v. Ducker*, S. C. S. Car., Oct. 6, 1887; 3 S. E. Rep. 465.

217. WILL — Validity—Capacity—Undue Influence—Instructions. —— Circumstances stated under which a testator possess sufficient capacity to make a valid will. Instructions upon undue influences if erroneous are harmless, if the evidence shows that the opportunity existed to exert such influence and does not show that it was actually exerted.—*Epling v. Hutton*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 242.

218. WITNESS — Fees — Recovery. —— A witness in a criminal case for the defendant, who is acquitted of the felony charges, may recover compensation from the defendant.—*Bennet v. Kroth*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 221.

219. WITNESS—Widow—Statute.——Under the statute law of New Jersey, a widow is a competent witness in a suit brought by her against the heirs at law of her deceased husband to set aside a deed for fund and can testify as to statements made by her husband.—*Crimmins v. Crimmins*, N. J. Ct. Chan., Oct. 15, 1887; 10 Atl. Rep. 800.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERY NO. 27.

A hires to teach a school for eight school months in Marion County, Kansas. He dismissed school on election day, thanksgiving day and Washington's birthday, and demands pay in full for said eight months, which district board refuses to advance, claiming A had a right to dismiss school on those days without permission of board, but that he was not entitled to pay therefor. He (A) also claims that teachers are also entitled to pay for Christmas and New Years also when taken as holidays. H.

QUERY NO. 28.

Facts: 1. B sued out attachment in an action for debt against A. 2. The attachment was levied on personal property—in value to equal the debt. 3. A replevied the property, giving as his bondsmen C, D, E and F, in double the value of the property levied on. 4. The action proceeded to judgment in usual form: (1) Judgment for debt against A; (2) judgment for the value of the property against C, D, E and F, to be satisfied as to them if A returns the property levied on by attachment to the sheriff. 5. A fails to return the property or any of it, so that all liability is fixed on C, D, E and F to the value of the attached property, and on A for the whole debt. 6. B causes execution to issue against all the judgment debtors. Levies are made on A's property and sales made, but does not realize enough to satisfy judgment, or equal the amount of the value of the attached property. 7. *Alias* execution issues, whereupon B receives of D and E money equal to their *pro rata* liability on the debt unpaid and executes to each of them receipts in acknowledgment of payment from them and discharges them from further liability on the judgment. Query: Does the discharge of D and E by B under all the facts operate as a discharge of C and F, their co-securities? Texas statutes do not affect the question. Cite authorities. W. H. & W.

QUERIES ANSWERED.

QUERY NO. 26 [*25 Cent. L. J. 456.*]

A is a bachelor without any one depending on him for support, and lives in his own house, doing his own cooking, etc. Is he a *housekeeper* in the meaning of that word as used in § 2689, Revised Statutes of Missouri? K.

Answer. A is certainly a housekeeper as that word is defined by the legal dictionaries. Homestead laws are always liberally interpreted. We think he is a housekeeper according to the Missouri decisions, though they are not very clear on that point. Brown v. Brown, 68 Mo. 388; Murdock v. Dalby, 13 Mo. App. 41.

RECENT PUBLICATIONS.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri, and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XX. Ignorance of Law–Kentucky. St. Louis, Mo.: The Gilbert Book Company. 1887.

We have now before us the twentieth volume of Myer's Federal Decisions, and are utterly unable to

say anything about it which we have not heretofore said with reference to its predecessors. The character of this compilation is now so well established that adverse criticism is innocuous, and commendation would weary like a thrice-told tale. The work has passed the limits within which reviewers can either make or mar reputation, and attained the secure dignity of a standard legal publication. The volume before us differs in no material respect from those which have already been submitted to our criticism. Like all the others, it is unexceptionable in arrangement, typographical execution and otherwise. The subjects treated in the opinions given in full, or abbreviated, are of course important, as may well be inferred from the fact that the last opens with "Ignorance of the Law" and closes with "Kentucky," and, of course, includes all those legal topics which are alphabetically to be found between those words. As we have already said in this notice, as well as on former like occasions, the character of this compilation is fully established and it is in all respects worthy of the favor bestowed upon it by the profession.

THE AMERICAN DECISIONS, Containing the Cases of General Value and Authority Decided by the Courts of the Several States from the Earliest Issue of the States Reports to the Year 1869. Compiled and Annotated by A. C. Freeman, Counselor at Law, and Author of "Treatises on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vols. XCI. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1887.

We have now before us the ninety-first volume of American Decisions. We have so recently published a notice of the ninetieth volume of this standard colection of cases, that it would be merely a superfluous repetition to say any thing further about the present issue than that it is fully equal to its predecessors.

JETSAM AND FLOTSAM.

PROCEEDINGS IN ATTACHMENT.

He sued the maiden for her hand,
And sought to give his cause a trial,
But when he made his first complaint,
She filed a general denial.

Such bonds, she said, would never do,
To his averments she demurred.
Each answer made his case the worse—
With each reply was hope deferred.

His pleadings were of no avail,
His arguments were all in vain,
She asked him still, what evidence
He brought, his issues to sustain.

He spoke of death, and threatened then
His execution, but she said
She gave no warrant for such deeds,
And he had better keep a-*head*.

He made his last appeal, in vain—
The stubborn maid would have her way;
Yet still he vows he'll have his rights
Upon the final judgment day.

—ALBION M. FELLOWS.

WHERE LAWYERS GO TO.—Not after they are dead, for that is a question entirely too delicate for discussion here, but to make a living. In this country they usually follow Mr. Greeley's advice and go west; in England, by the rules of contrariness, we suppose, they go east. How they fare when they get there will appear by the subjoined extracts from a London legal journal:

Here is one picture, *coleur de rose:* Indian Jurist, writing in *Pump Court*, says: "The question has been asked in your columns, 'What are the prospects which can be said to be sufficient to allure Mr. Briefless from England to India?' Here is an instance in support of my contention that it is better for a young barrister to go to India, or even to the colonies, than to drag on a precarious existence here in London for some five or six years: Mr. Eardley Norton, the Lion of the Madras Bar, has gone to Hyderabad in a big civil suit, receiving a fee of 30,000 rupees (£3,000). His father, John Bruce Norton, received £10,000 on one occasion for his professional services. Mr. John Dawson Mayne made £7,500 in three cases in three courts, and was only six weeks from his home in Madras.

The salary of a covenanted civil servant, as a district and sessions judge, is about £2,800 a year; therefore, Mr. Eardley Norton by his fees in one case earns in a few days or weeks more than the judge in a twelve-month, and though he may not average the judge's salary in a given number of years, £3,000 is a very nice little nest-egg. This Mr. Norton is the 'Coroner of Madras,' a fairly paid appointment. The presidency magistrate, on £1,000 a year, is a member of the English Bar. The professor of law in the Madras University ditto. The High Court Law Reporter is of the Middle Temple.

I have, I think, made out my case, which is, that a young man called to the bar has infinitely more chance of doing well, if nothing more, at the bar in India during the first ten years after his call than falls to the lot of one in a hundred of those in London who cannot count on success (1) by writing a book that will sell, (2) by marrying a solicitor's daughter, or (3) by a miracle."

And here is another, pessimestic!

A correspondent writing to the *Law Journal* says: "I have just returned from New South Wales, where I proceeded on professional business, and during my sojourn, which extended over a period of eighteen months, I had an opportunity of judging as to the advisability of settling down and practicing. I made an unsuccessful endeavor to obtain a clerkship, and wasted five months in that attempt, and during that period every application was backed by some of the most influential residents. There are only between 300 and 400 solicitors in Sydney, and they will not take into their employ an English solicitor. I know of my own knowledge that nine English barristers applied to one firm of solicitors for a clerkship in one week; and there are hundreds of English professional men walking about and doing all kinds of menial labor so as to obtain sufficient to keep life within them. Professional men are not wanted in the colonies, which want mechanics and agriculturists with capital to open out the country."